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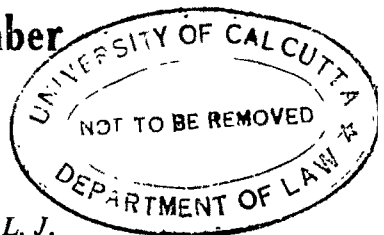
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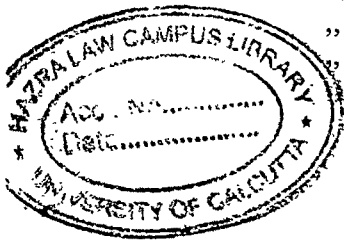
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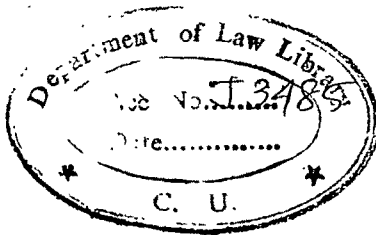
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The Calcutta Law Journal

REPORTS

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Sankar Prasad Mitra, Chief Justice, Mr. Justice Sambhu Charan Ghose, Mr. Justice Sabyasachi Mukharji, Mr. Justice Salil Kumar Datta and Mr. Justice Arun Kumar Janah

Decision : January 19, 1978

Pushraj Puranmull & Petitioner
Versus

N. Roy & Ors. Respondents*

West Bengal Relief Undertakings (Special Provisions) Act (13 of 1972)
—Challenge to legislative competence of State and Notifications issued under
—Item 23 of List III—Provisions for giving temporary relief against harassment by creditors to certain undertakings to enable such undertakings to rehabilitate themselves and start functioning in order that their employees might not lose their sources of subsistence—Item 33(a) in list III.

In the instant writ application, the validity of the West Bengal Relief Undertakings (Special Provisions) Act 1972 has been challenged. The petitioner asks for a declaration that the Act is beyond the legislative competence of the State of West Bengal and is void. The petitioner has also prayed for issue of a writ of mandamus or appropriate direction for recall, cancellation and withdrawal of Notification Nos. 1272—CSI and 1277 CSI, both dated March 24, 1977 issued by the Dy. Secretary to the Government of West Bengal, Department of closed and Sick Industries. By the first Notification the State Government declared Messrs. Nafar Chandra Jute Mills Ltd. to be a relief undertaking. By the second Notification, the state Government directed that the operation of all contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force relating to the relief undertaking shall remain suspended.

The petitioner claims to be creditors of the said Jute Mills. It has been affected by the said notifications inasmuch as it is unable to take steps for realisation of its dues.

HELD: Reading the Act as a whole, it appears that the State Government was attempting to give temporary reliefs particularly against harassment by creditors to certain undertakings to enable such undertakings to rehabilitate themselves and start functioning efficiently in order that the

*Matter no. 472 of 1977.

persons employed by them might not lose their sources of subsistence. In view of these considerations it is held that the West Bengal Relief Undertakings (Special Provisions) Act 1972 is intra vires the powers of the State Legislature as it has been enacted under the powers conferred by Item 23 in List III of the Seventh Schedule of the Constitution of India.

It has also been argued that the said Act may come within the scope of Item 33(a) of List III. Since it has already been held that the Act is within the scope of Item no. 23 in List III, it is unnecessary to discuss the contentions of the parties on Item no. 33. The Act intends to give a breathing time to a sick industry and thereby encourage it to continue its production activities. And from this point of view it may be held that the Act is inter vires the powers of the State Legislature under Item 33(a) of List III of the Seventh Schedule of the Constitution.

Cases referred to :—

- (1) *Prafulla Kumar Mukherjee v Bank of Commerce Ltd.*, 74 IA 23
- (2) *Gallagher v. Lynn*, (1937) AC 863
- (3) *Monogram Mills Ltd. v. State of Gujarat*, (1976) SC 2177
- (4) *D. S Patel & Co. v. Gujarat State Textile Corporation Ltd. & Ors.*, 4 Company Cases 1098

R. C. Deb, Bhaskar Gupta and R. Deb. ... for the Appellants
The Standing Counsel and the Jr. Standing Counsel ... for the Respondent
 Nos. 1, 2 and 3
R. N. Bajoria, S. K. Bajoria and B. K. Chatterjee...for the Respondent no. 4
A. K. Sen and J. Pugalla ... for the Jute Creditors
T. K. Biswas and S. K. Mallick ... Appears with the leave of Court
 for the creditors.

The judgment of the Court was as follows :—

Mitra, C. J. : In this application under Article 226 of the Constitution the validity of the West Bengal Relief Undertaking (Special Provisions) Act, 1972 has been challenged. The petitioner asks for a declaration that the Act is beyond the legislative competence of the State of West Bengal and is void. The petitioner has also prayed for issue of a writ in the nature of mandamus or appropriate direction for recall, cancellation and withdrawal of Notifications Nos. 1272-CSI and 1277-CSI both dated the 24th March, 1977 issued by the Deputy Secretary to the Government of West Bengal, Department of Closed & Sick Industries. By the first Notification the State Government in the exercise of power conferred by Section 3 of the Act declared Messrs. Nafar Chandra Jute Mills Ltd. to be a relief undertaking. By the second Notification the State Government directed in the exercise of power conferred by section 4 of the Act that the operation of all contracts, assurances of property, agreements, settlements, awards,

standing orders or other instruments in force relating to the relief undertaking shall remain suspended.

2. The petitioner claims to be a creditor of the said Jute Mills. It has been affected by the notification's like many other creditors inasmuch as it is unable to take steps for realisation of its dues.

3. To appreciate the petitioner's contentions it may be convenient to refer to some of the entries in the three lists in the seventh schedule to the Constitution. Entry 52 of List I is "Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest". Entry 24 in list II is "Industries subject to the provisions of entries 7 and 52 of list I".

4. There are a few other entries in List III which should be noted in this connection. Item No. 23 in List III is "social security and social insurance: *employment and unemployment*". Item No. 33 is "trade and commerce in, and the production, supply and distribution of:-

(a) the products of any industry where the control of such industry by the Union is declared by Parliament to be expedient in the public interest, and imported goods of the same kind as such products;"

On behalf of the petitioner our attention was drawn to the Industries (Development and Regulation) Act, 1951. This Act was passed by Parliament and it came into force by a notification in the Gazette of India Extraordinary on the 8th May, 1952. By section 2 of this Act the Parliament declared that it was expedient in the public interest that the Union should take under its control the industries specified in the first schedule. Item No. 23 in the first schedule to this Act include jute and jute textiles. According to the petitioner the said declaration was made by Parliament by law under Entry 52 in list I.

5. The petitioner then contends that Entry 24 in list II enables the State Legislature to legislate in regard to industries but subject to the provisions of *inter alia* Entry 52 in list I. The State Legislature, therefore does not have competence to legislate in respect of industries the control of which has been taken over by the Union.

6. The petitioner submits that the West Bengal Act referred to above relates to control and regulation of industries in the State by the Government of West Bengal. The applicability of the State Act must be confined to those industries the control of which by the Union of India has not been declared by Parliament by Law to be expedient in public interest.

7. The petitioner's contention is that since the control of jute industry is a subject matter of the Industries (Development and Regulation) Act, 1951, the West Bengal Act has no application to jute industry. The impugned notifications relate to jute industry and are,

therefore, ultra vires and void. There are no entries either in List II or List III, according to the petitioner, under which the West Bengal Act could have been enacted.

8. It is wellknown that the entries in the three lists have been widely construed. While interpreting the entries Courts have on numerous occasions discovered over-lappings. It often happens that legislation made under a particular entry may incidentally touch upon or affect another entry in another list. That is why, the Judicial Committee in the case of (1) *Prafulla Kumar Mukharjee v. Bank of Commerce Ltd.*, 74 IA page 23, said that in distinguishing between the powers of the divided Jurisdictions under lists I, II and III of the Seventh Schedule to the Government of India Act, 1935, it was not possible to make a clean cut between the power of the various legislatures. According to the Judicial Committee these powers are bound to over-lap from time to time and the rule has been evolved by the Judicial Committee itself whereby an impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining in which particular list the legislation falls. The Judicial Committee applied these principles to Indian and dominion legislation. It was of the view that the extent of invasion by the provincial legislature into subjects enumerated in the Federal List was material for the purpose of determining what was the pith and substance of the impugned Act.

9. The House of Lords in (2) *Gallaghe v. Lynn* (1937) AC 863 was considering the powers of the Parliament of Northern Ireland. It was held that if in considering whether a statute was within the competence of a Subordinate Legislature to pass, it was found that the substance of the legislation was within the express powers, it was not invalidated because incidentally it affected matters which were outside the authorised field. The House of Lords observed further that the Legislature must not, however, under the guise of dealing with one matter encroach upon forbidden field.

10. Ever since the Judicial Committee laid down the principle aforesaid it had been uniformly applied till the present day to all cases of difficulties created by over-lapping of entries in the three lists. The latest case to which our attention was drawn was the case of (3) *Monogram Mills Ltd. v. State of Gujrat* AIR (1976) SC 2177. In the instant case also the doctrine of pith and substance has to be invoked. If upon examination of the impugned Act we find that its pith and substance is a subject falling within an entry in list III the Act cannot be struck down on the ground that it touched upon an item in list I. No entries in the lists should be so construed as to curtail the scope and ambit of other entries in other lists.

11. Bearing these principle in mind we have to discover the pith

and substance of the West Bengal Relief Undertakings (Special Provisions) Act, 1972.

12. The preamble to the Act says that it is "An Act to enable the State Government to make special provisions for a limited period in respect of industrial relations, financial obligations and other like matters in relation to industrial undertakings the running of which is considered essential *as a measure of preventing, or providing relief against, unemployment.*"

13. It is further stated: "Whereas it expedient to enable the State Government to make special provisions for a limited period in respect of industrial relations, financial obligations and other like matters in relation to industrial undertakings the running of which is considered essential *as a measure of preventing, or of providing, relief against unemployment :*

14. It is hereby enacted in the Twenty-third Year of the Republic of India, by the Legislature of West Bengal, as follows :

15. When the Bill was presented to the West Bengal Legislature its object was stated as follows :

"A number of industrial undertakings in West Bengal are now closed down for various reasons resulting in substantial loss in production and in employment. For continued economic operation of such industrial units, the State Government in some cases advanced loans, furnished guarantees for Bank, loans and even took over the equity shares of some units in the past. Unfortunately, most of the money advanced by the Government was consumed by the past liabilities or large overheads of beneficiary units. In order to enable the State Government to revive and re-start these industrial undertakings and operate them efficiently and *thereby provide employment to a large number of workers*, it is essential that the State Government should have suitable powers to free the industrial undertakings for a short period from certain financial obligations in the past and to exempt them from the scope of certain labour laws..... Similar legislation has been enacted in the States of Maharashtra, Gujarat, Madhya Pradesh, Kerala, Rajasthan and Tamil Nadu. The main provisions of the Bill have also been incorporated by the Parliament in the Industries (Development and Regulation) Act by a recent amendment, but the State Government has no power under that.

16. From the preamble and the objects set out above we get the indication that the primary intention of the State Legislature was to prevent unemployment or provide relief against unemployment. Various industrial undertakings had been closed down particularly for financial difficulties resulting in unemployment of a large number of workers in a State in which the problem of unemployment was most acute. The

State Legislature was attempting to take steps for the revival of these industrial undertakings so that the unemployed workers might be re-employed and one of the baffling problems of the State might be solved at least to some extent.

17. If we now look at some of the sections of the Act we would appreciate what the State Legislature intended to do. Section 3 of the Act runs thus :

‘Section 3. *Declaration of relief undertaking*—The State Government may, if it is satisfied that it is necessary or expedient so to do in the public interest, with a view to enabling the continued running or re-starting of a State industrial undertaking as a measure of preventing, or of providing relief against unemployment, declare by notification, that the State industrial undertaking shall, on and from such date and for such period as may be specified in the notification, be a relief undertaking ;

18. Provided that the period so specified shall not, in the first instance, exceed one year but may, by a like notification, be extended, from time to time, by any period not exceeding one year at any one time, so however that no notification issued under this section shall in any case remain in force for more than five years in the aggregate.”

19. By section 3, therefore, the State Government has been given the power to declare by notification that an industrial undertaking is a ‘relief undertaking’. This declaration would be made for the continued running or re-starting of the undertaking as a measure of preventing or of providing relief against unemployment.

20. We now come to section 4 the provisions whereof are as follows :-

“4. *Application of certain enactments and contracts, agreements, etc. to relief undertaking*—The State Government may, if it is satisfied that it is necessary or expedient so to do for the purposes specified in section 3, direct, by notification,—

(a) that in relation to any relief undertaking all or any of the enactments specified in the schedule to this Act shall not apply or shall apply with such adaptations, whether by way of modification, addition or omission (which does not, however, affect the policy of the said enactments, as may be specified in such notification ; or .

(b) that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force (to which any relief undertaking is a party or which may be applicable to any relief undertaking) immediately before the date on which the State industrial undertaking is declared to be a relief undertaking shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be

enforceable with such modifications and in such manner as may be specified in such notification."

21. By this section the State Legislature is making provisions for modifications, additions or omissions of certain Acts. These Acts have been mentioned in the schedule to the Act. They are (i) the Industrial Employment (Standing Orders) Act, 1946, (ii) the Industrial Disputes Act, 1947; (iii) the Minimum wages Act, 1948 and (iv) the West Bengal Shops and Establishments Act, 1963. The State Legislature is also making provisions for temporary suspension of the operation of contracts, agreements, settlements, awards etc. to enable the relief undertaking either to continue its operation or re-start its operation unhampered by the burden of the past liabilities and obligations for the time being.

22. By section 8 of the Act power has been given to the State Government to make rules. In particular the State Government may frame rules relating to (a) the rates of wages payable to the workmen and their workloads and the salary payable to the staff, the payment of bonus, gratuity, compensation, and other benefits; (b) the manner in which the relief undertaking should be run; (c) the strength of staff and labour to be employed for running the relief undertaking economically; (d) the manner in which the net profits or net losses or surplus funds should be appropriated or disposed of; (e) the percentage of profits to be utilised for the benefit of the persons employed in the undertaking and the manner of its utilisation; and (f) the manner in which, and the extent to which the representatives of the workmen may be associated with, or may participate in the management of the relief undertaking.

23. It appears that the State Government was expected to frame rules to ensure a smooth functioning of the relief undertaking after it gets the protection envisaged by sections 3 and 4.

24. From all the provisions set out above the pith and substance of the legislation appears to us to be prevention of unemployment or providing relief against unemployment. And it comes directly within the scope of item 23 of list III. The legislation, therefore, cannot be struck down on the ground that it is beyond the competence of the State Legislature.

25. Our attention has been drawn to a decision of a Division Bench of the Gujarat High Court in (4) *D. S. Patel & Co. v. Gujarat State Textile Corporation Ltd. & Ors.* reported in 4 Company Cases at page 1098. The Bombay Relief Undertaking (Special Provisions) Act was enacted for three main purposes, namely: (1) to make temporary provisions for industrial relations; (2) to enable the State Government to conduct, or provide loan, guarantee or financial assistance for the conduct of certain industrial undertakings in question and (3) to do the above as a measure of preventing unemployment or of unemployment relief. The Act consists of four sections only. The first section provides for the title and extent of the Act and the second for definitions. Under section 3 the Act

applies to any industrial undertaking which is either run by the State Government or to whom the State Government has provided financial assistance. Notifications can be issued under section 3 declaring that an industrial undertaking shall with effect from a specified date be conducted to serve "as a measure of preventing unemployment". Under section 4 the State Government can exercise wide powers to give temporary relief to the undertaking not only from the claims of creditors but also from demands of labour under different labour laws, agreements and awards.

26. The Gujarat High Court has noted that under the Industries (Development and Regulation) Act, 1951, if an industrial undertaking is managed in a manner detrimental to the industry or public interest the Central Government could by notified order authorise any person or body of persons to take over the whole or any part of the management of the undertaking.

27. The Gujarat High Court has noted further that under the Industries (Development and Regulation) Act a textile mill in Gujarat was ordered to be managed by the Gujarat Textile Corporation. With regard to the same mill, notifications were issued under sections 3 and 4 of the Bombay Relief Undertakings (Special Provisions) Act declaring the mill to be a relief undertaking from February 21, 1969 and declaring that all rights, privileges, obligations and liabilities accrued or incurred before the undertaking was declared a relief undertaking and any remedy for enforcement thereof shall be suspended with effect from the 21st February, 1969.

28. The petitioners before the Gujarat High Court to whom the mill owed money challenged the validity of the State Act. They contended that (i) the Act dealt with industry which was within the legislative competence of Parliament and hence contravened Articles 245 and 246 of the Constitution ; (ii) the Act was in conflict with the Industries (Development and Regulation) Act ; (iii) under the Act there was excessive delegation of power in favour of the State Government and discrimination with persons falling in the same classification infringing Article 14 ; (iv) the Act also infringed the right to property granted under Article 19 (1) (f) ; and (v) the notifications issued under Sections 3 and 4 were vitiated as they had been issued by the Government without applying its mind.

29. The Gujarat High Court has held that in deciding the true nature and character of a Statute which is impugned on the ground that it is *ultra vires* the power of the legislature reference can be made to its long title, preamble and other provisions in it. It would not be a proper approach to consider the provisions of the Statute piecemeal and decide what provisions thereof are *intra vires* and what are not. Applying this test it was evident that the main object of the State Act was to prevent unemployment. Sections 3 and 4 of the Act made some provisions which

touched the subject of industry and therefore encroached upon a legislative subject in the Union List. But this encroachment was merely incidental to the main object of the State List. An incidental encroachment on an entry contained in another List would not invalidate an enactment. The State Act fell within Entry 23 of the concurrent List of the Seventh Schedule to the Constitution and was within the legislative competence of the State Government.

30. The Gujarat High Court has expressed the view that the provisions of the State Act were complementary to those of the Central Industry (Development and Regulation) Act. The State Act would serve the purpose of stabilizing the economy of an undertaking. Section 3 merely provided that the industry should be conducted to serve as a measure of preventing unemployment. It was not tantamount to take over or control the management of the industry.

31. No delegation of legislative power, says the Gujarat High Court, can be considered excessive if it is found that the Statute contains a clear-cut policy statement and provides necessary guidelines for exercise of power. The long title and preamble of the State Act suggested the general policy of preventing unemployment. Conditions were prescribed for the application of the Act. Though section 4 vested wide powers not only for the purpose of taking action but also for making the selection, that power was controlled by the express policy enunciated in the long title and preamble of the Act and the guidelines provided by section 3. Moreover, the discretion was left not to any officer but vested in the State Government itself. There was no excessive delegation of legislative power.

32. In this judgment we have considered the long title, the preamble and the object and the other provisions of the West Bengal Act and have come to the conclusion that its pith and substance is prevention of unemployment or providing relief against unemployment and, as such, the State Legislature had power to enact it under Item 23 of List III. It has been submitted to us that the judgment of the Gujarat High Court is not relevant for our purposes. The West Bengal Act does not impose any legal duty to run the industry so as to prevent or provide relief against unemployment.

33. In our view, the judgment of the Gujarat High Court is of considerable assistance in determining the vires of the West Bengal Act. In section 3 of the West Bengal Act it is provided that the notification declaring an undertaking to be a relief undertaking shall, in the first instance, be for one year only. The State Government may extend the period from time to time but the maximum period shall be five years. And the extension will also be for a period of one year at a time. These are indications that the protection of the Act would not be available to a sick industry if it is not run properly. Then again, section 8(1) and (2)

of the Act also tries to ensure that the undertaking is run smoothly and economically. Reading the Act as a whole our impression is that the State Government was attempting to give temporary relief particularly against harassment by creditors to certain undertakings to enable those undertakings to rehabilitate themselves and start functioning efficiently in order that persons employed by them might not lose their sources of subsistence. In view of these considerations we are of opinion that the West Bengal Relief undertakings (Special Provisions) Act, 1972, is *intra vires* the powers of the State Legislature as it has been enacted under powers conferred by item 23 in List III of the Seventh Schedule to the Constitution.

34. It has also been argued before us that the Act can come within the scope of Item 33(a) of List III. Since we have already held that the Act is within the scope of Item 23 in List III, it is unnecessary for us to discuss the contention of the parties on Item 33. We would only observe that upon taking into consideration all the provisions of the Act the argument that its pith and substance is the ensuring of production in a sick industry is of substance. The Act intends to give a breathing time to a sick industry and thereby encourage it to continue its production activities. And from this point of view it may be held that the Act is *inter vires* the powers of the State Legislature under Item 33(a) of list III.

35. In the result, therefore, this application is dismissed. Interim orders, if any, are vacated. We make no order as to costs.

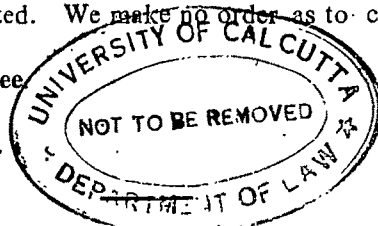
Ghose, J. : I agree.

Mukharji, J. : I agree.

Datta, J. : I agree.

Janah, J. : I agree.

S.P.M.



[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Salil Kumar Datta

Decision : June 9, 1978

Shew Karan Agarwalla & Anr. ... Appellants in S.A. no. 1834/70

And

Mundhra Bros. & Anr. ... Appellants in S.A. no. 460/74

Versus

Satya Narain Mansinka ... Respondent*

West Bengal Premises Tenancy Act (12 of 1956), Sec. 13(1) (f) & (ff)

-- Position after Supreme Court judgments -- Procedure to be followed.

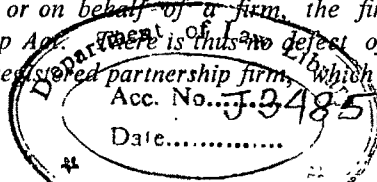
Civil Procedure Code (Act-5 of 1908), Or 30, r. 1—Construction of the provision—Whether suit is maintainable in the name of a partnership firm.

*S. A. no. 1834/70 and S. A. no. 460/74.

These two second appeals arise out of two ejectment suits. The ground of eviction was under the original clause (f) of section 13(1) of the West Bengal Premises Tenancy Act 1956. This clause was substituted by clauses (f) and (ff) by the Second Amendment Act 1969. Since these clauses have been made applicable to pending proceedings even in second appeal the Supreme Court in AIR 1975 SC 1146 held that liberty should be given to the plaintiff to file fresh pleadings setting out his grounds under clause (f) and of clause (ff) with opportunity to the tenant to file his additional written statement. The court thereafter was directed to dispose of the suit giving both sides the right to lead additional evidence. It was further held that it would be open to the appellate court either to take evidence directly or to call for a finding. Subsequently in *Balai Chandra v. Shedhari Jadav*, the Supreme Court held in effect that after amendment of pleadings in the High Court in second appeals or Letters Patent Appeals therefrom, the High Court has no jurisdiction to take evidence itself and decide the issue on the basis of the evidence so adduced.

HELD: That being the position, it is not within the legal competence of the High Court to take evidence in High Court and appreciate the evidence and dispose of the appeal on such appreciation of evidence and findings of fact thereon. Therefore the question arises in these cases whether the suits should be remanded to the first appellate court or to the trial court. It is desirable to send back the cases to the first court whether the entire suit or only some of the issues would be sent down for determination is a matter which rests entirely at the discretion of the High Court.

Under Section 4 of the Partnership Act, persons who have entered into partnership with one another are called individually "Partners" and collectively "a firm" and the name under which their business is carried on is called "firm name". Under Order 30 Rule 1 of the Code of Civil Procedure any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm, if any, of which such persons were partners at the time of the accruing of the cause of action. Though a firm is not a legal corporate entity nor a person the word 'firm' in a suit or proceeding is nothing more than a convenient method for denoting the persons who constituted the firm at the time of the accrual of the cause of action. Order 30 Rule 1 of the Code makes it permissible to file a suit by or to be sued in the name of the firm, not as a distinct legal entity but as a convenient mode of describing the partners at the time of accrual of the cause of action and the firm, as a party to the suit is merely a collective name of the partners and is really against all partners of the firm at the time of the cause of action though for the institution of a suit by or on behalf of a firm, the firm must be registered under the Partnership Act. There is thus no defect of parties in the connected suit against the registered partnership firm, which is, in law,



12 *Shew Karan Agarwalla & Anr. v. Satya Narain Mansinka* [1978(2)CLJ

a suit against all the partners at the time of accrual of the cause of action.

• Cases referred to :—

(1) *B. Banerjee v. Anita Pan*, AIR 1975 SC 1146

(2) *Balai Chandra Hazra v. Shedhari Jadav*, an unreported Supreme Court decision dated 21.2.78 in Civil Appeal no. 1138 of 1977

Ranjit Kumar Banerjee and Sailendra Bhusan Baksi ... for the appellants in S.A. no. 1834 of 1970

Sailendra Bhusan Baksi and J. L. Pugalia ... for the appellants in S.A. no. 460 of 1974

T. P. Das, Miss Jolly Sett, Miss Archana Roy ... and Prasun Chowdhury ... for the respondent in S.A. no 1834 of 1970

Saktinath Mukherjee and Gouri Sankar Gupta ... for the respondent in S.A. no. 460 of 1974

The judgment of the Court was as follows :—

Those two appeals have been heard before me, one after the other, and practically common questions of law and of fact are involved in these appeals. They will be governed by this judgment.

2. The same plaintiff in both the connected suits is the landlord of the respective defendants in respect of two shop rooms, with a godown room in addition in respect of one tenancy of Mundhra Brothers, of the house with C.I. roof, wooden walls, pucca floor situated in Holding No. 6, Ward XVIII of the Siliguri Municipality. The tenanted premises had been held by the defendants as monthly tenants according to English Calender month. According to the plaintiff, the premises were very old and in dilapidated condition and "therefore the premises are reasonably required by him for purposes of building and rebuilding." The tenancies were duly determined by notice containing also the threat of suit. As the defendants failed to vacate, two suits were instituted in 1966 against the tenants, one, being O.C. Suit No. 24 of 1966 against M/s. Mundhra Stores and another, the appellants in SA No. 460 of 1974 and the other being, O. C. Suit No. 40 of 1966 against Shew Karan Agarwalla and another, the appellants in SA No. 1834 of 1970.

3. The suits were contested by the respective defendants *inter alia* denying that premises were in old and dilapidated condition or that the plaintiff reasonably required the premises for building and rebuilding. The suits were tried on evidence and while the OC Suit No. 40 of 1966 was dismissed, the OC Suit No. 24 of 1966 was decreed. On appeal, the OC Suit No. 40 of 1966 was decreed in reversal of the decree of dismissal of the suit by the trial court, while the appeal against decree for possession in OC Suit No. 24 of 1966 was dismissed. These appeals are against the aforesaid decisions.

4. The ground of eviction was under the original clause (f) of

Section 13 (1) of the West Bengal Premises Tenancy Act, 1956. This Clause was substituted by Clauses (f) and (ff) by the West Bengal Premises Tenancy (Second Amendment) Act, 1969. Since these clauses have been made applicable to pending proceedings even in second appeal the Supreme Court in (1) *B. Banerjee v. Anita Pan*, AIR 1975 SC 1146, while upholding the constitutional validity of amending provision of Sub-section 3A of Section 13 with retrospective effect, gave liberty to the plaintiff to file fresh pleadings setting out his grounds under Clause (f) and of (ff) if they were so advised with opportunity to the tenant to file his written statement. The court thereafter was directed to dispose of the suit after giving both sides the right to lead additional evidence. The Court further laid down that it would be open to the appellate court either to take evidence directly or to call for a finding.

5. In these appeals also, the plaintiff filed before this Court, as the appeals came before hearing, applications for fresh pleadings in the plaints in the two suits incorporating the requirement of the amended clause (f) to which there was no opposition as there could be none. The amendments were allowed by this Court on January 19, 1978 and are by addition to that paragraph of the plaint which describes the premises as being in very old and dilapidated condition and as such the plaintiff reasonably required the premises for building or rebuilding. Fresh pleadings were to the effect that the plaintiff's reasonable requirement of the premises for building or rebuilding could not be carried out without the suit premises being vacated by the tenant. After the amendments were allowed the tenants appellants filed their respective written statements.

6. This Court also framed an additional issue on the fresh pleadings in both the suits which is as follows :—

“Whether the plaintiff landlord reasonably requires the suit premises for building or rebuilding and if so, whether such building or rebuilding cannot be carried out without the premises being vacated by the defendant.”

With the view to shorten the litigation, this Court, relying on the afore-said decision of the Supreme Court fixed the cases for hearing when the parties were directed to produce evidence in support of their respective cases on the fresh pleadings.

7. At the hearing, Mr. Baksi learned Advocate for the appellant, produced a plain copy of the judgment of the Supreme Court in Civil Appeal No. 1138 of 1977 dated February 21, 1978 (still unreported) (2) *Balai Chandra Hazra v. Shedhari Judav*, contending that after amendment of pleadings in the High Court in such second appeals or Letters Patent appeals therefrom, this Court has no jurisdiction to take evidence itself and decide the issue on basis of the evidence adduced. In the cited case also the High Court in the connected Letters Patent Appeal from the

Second Appeal allowed an amendment to the plaint to bring it within the purview of clause (ff) of Section 13(1) of the Act and framed two issues arising from the amended pleadings. The High Court also took evidence and heard the appeal and the decree of eviction was affirmed. The Supreme Court noted in the judgment in the appeal therefrom that the findings of fact recorded by the first appellate court are binding and the position will be the same even if fresh evidence is allowed to be taken on amended pleadings and appreciation of evidence to record a finding of fact is necessary for disposal of the appeal. The Court hearing a second appeal under Section 100 of the Code of Civil Procedure as it was then has no power to take over the functions of the trial court or the first appellate court and undertake appreciation of evidence and record findings of facts. The power of the High Court under Section 103 is limited to evidence on record which again is sufficient to determine an issue of fact necessary for disposal of the appeal which has not been determined by the lower appellate court or wrongly determined by such court for reasons mentioned therein. When pleadings are amended at the stage of a Letters Patent Appeal from a second appeal or a second appeal and fresh allegations of facts are introduced in the controversy which necessitate additional evidence being permitted it will not be open to the High Court to proceed to record findings of fact, as the High Court has to work under constraint of Section 100 as it then was and also Section 103 of the Code. When on account of subsequent change in law, amendment of pleadings is granted which raises disputed questions of fact the situation would not be one governed by order 41 Rule 27 of the Code as the case is not one where the appellate court whose decree is under appeal has refused to admit evidence adduced or the appellate court requires any evidence to enable it to produce judgment nor such a situation is covered under the expression "other substantial cause." The function of appreciation of evidence adduced on amendment of pleadings bringing into focus new or fresh disputed questions of fact, should appropriately be undertaken by the trial court, or, at the most, the first appellate Court but not the High Court hearing a second or Letters Patent Appeal from a Second Appeal though the High Court has the full competence to grant amendment of pleadings.

8. In view of the above position, as pointed out by the Supreme Court it is not within the legal competence of this Court to take evidence in this Court and appreciate the evidence and dispose of the appeal on such appreciation of evidence and findings of fact thereon. The order passed by this Court in so far as the same relates to a trial on evidence in this Court on amended pleadings has to be recalled. I accordingly recall the portion of the orders in the said appeals both dated March 17, 1978 fixing the cases for trial on evidence in this Court on the additional issue framed by me as aforesaid.

9. The next question for determination is as to whether the suits should be sent back to the first appellate court or to the trial court. Both courts it appears have concurrent jurisdiction to decide the questions of fact arising from the issues in controversy in the suit. Even so, to direct the first appellate court to take evidence and decide the issue would be to deprive the aggrieved party of a forum of trial which will not be appropriate in view of the contest and in the attending circumstances even though this may cause some delay in the final disposal of the suits.

10. Further question arises as to whether the suits in entirety should be sent back for trial, including the issues in respect whereof no additional evidence is necessary. In the case before the Supreme Court, the entire case was sent back for trial on evidence but such course cannot be said to be laying down a proposition that the suit should always be sent back to the trial court or the lower appellate court for a decisions on all issues. In these appeals before us it is submitted that there are in addition issues on notice and its service as also to the maintainability of the suit which also should be decided by the trial Court along with other issues. I do not, however, think it proper to have fresh trial on issues already decided which has nothing to do with fresh pleadings. Accordingly, I propose to decide the controversy in regard of the notice in both appeals and as also the dispute as to the maintainability of the suit in regard to S.A. No. 460 of 1974.

11. On perusal of the notices, I do not find any infirmity in them while no dispute had ever been raised in either of the appeals about their due service. It was also contended that notice on a registered partnership firm or on one of its partners is invalid in law as the partnership is not a legal or corporate entity. The partnership firm under the provisions of the Partnership Act 1932 is the collective name of all partners so that contract between a partnership firm in firm name with third party, is, in law, a contract between the partners of the firm as its partners with such third party, even though partnership by itself is not a legal entity or corporate body. Accordingly the notice on the partnership firm in firm name determining the tenancy which was in the name of the firm duly served is thus otherwise valid. The findings of the courts below as to the validity of the notices and the service thereof are upheld.

12. As to the maintainability of the suit, it has also been urged in S.A. No. 460 of 1974 that the tenant is a registered partnership firm but it has no corporate existence and Order 30 Rule 1 is merely an enabling provision. Accordingly all the partners should have been made parties to the suit and the failure to implead all partners, instead of one as done is fatal for which the suit is liable to be dismissed.

13. Under Section 4 of the Partnership Act, 1932, persons who have entered into partnership with one another are called individually

"Partners" and collectively "a firm" and the name under which their business is carried on is called "firm name". Under Order 30 Rule 1 of the Code any two or more persons claiming or being liable as partner and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action. Though a firm is not a legal or corporate entity nor a person, the word 'firm' in a suit or proceeding is nothing more than a convenient method for denoting the persons who constituted the firm at the time of the accrual of the cause of action. Order 30 Rule 1 make it permissible to file a suit by or to be sued in firm name, not as a distinct legal entity but as a convenient mode of describing the partners at the time of accrual of the cause of action and the firm, as a party to the suit is merely a collective name of its partners and is really against all partners of the firm at the time of the cause of action though for institution of a suit by or on behalf of a firm, the firm must be registered under the Partnership Act, 1932. There is thus no defect of parties in the connected suit against the registered partnership firm which is, in law, a suit against all partners at the time of the accrual of the cause of action.

14. The Courts below have arrived at the findings on the reasonable requirement of the plaintiff in respect of the suit premises for building or rebuilding and also considered the impact of Clause (f) of section 13(1) as amended. In the context of the fresh pleadings, and the liberty given to the parties to adduce further evidence thereon it is necessary to reconsider and reappraise the position as to reasonable requirement of the suit premises by the plaintiff and if so, to examine whether such building or rebuilding cannot be carried out without the premises being vacated by the tenants. In the circumstances, I set aside the findings arrived at by the courts below in this respect, without examining their validity on merits or expressing any opinion thereon and sent back the cases to the trial court for decision on all other issues in the suit including the additional issue framed by me, except the issues on notices and on the maintainability of the suit, which, in agreement with the courts below, have been held in favour of the plaintiff. The trial court will afford opportunity to the parties to adduce further evidence in support of their respective cases and dispose of the suits in accordance with law with utmost expedition on materials already on record and on further materials as may be made available to it by the parties. I further add that I am expressing no opinion on the merits of the cases or on findings on other issues under appeal except on issues held by me in favour of the plaintiff respondent as aforesaid.

15. The appeals are allowed in part as indicated above but there will be no order for costs in the circumstances. Let the records be sent down at once. Let also the additional written statements be sent to the trial Court after retaining a copy thereof in the records of this Court.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Nirmal Chandra Mukherji

Decision : June 27, 1978

Badhu Bala Debi

...

...

...Appellant

Versus

Gobardhan Chattaraj & Anr.

...

...Respondents*

Easement—Acquisition of such right by prescription or implied grant—Whether affected by sec. 4, W. B. Land Reforms Act—Two sets of tenants under same landlord—Whether one such tenant can claim acquisition of easement right by prescription or lost grant against another such tenant—Principle as in English law—Whether applicable in Indian—Sufficiency of evidence to establish easement right

An important question of law is involved in this second appeal. It is contended on behalf of the appellant that both the plaintiff and the defendants are tenants under the same landlords and that being so, one tenant can not claim easement right against another. On behalf of the respondents it has been submitted that the principle of law on which the appellant wants to rely applies to the English law and the same is not applicable to the Indian law. It is also submitted that according to the provisions of section 4 of the West Bengal Land Reforms Act none is a tenant since the promulgation of the Act and all persons in occupation of land are owners and that being so, it cannot be said that one tenant is claiming easement against another tenant.

HELD : Considering the facts and circumstances of the case, it appears that Section 4 of the W. B. Land Reforms Act does not help the respondents.

It is next contended on behalf of the respondents that assuming that one tenant can not claim easement right by prescription against another tenant under the same landlord, even then such a right can be claimed on the basis of implied grant.

HELD : Although one tenant may claim the right of easement against another tenant on the basis of implied grant, he cannot claim the right of easement against another tenant on the basis of prescription.

The defendants have made out a case in their pleadings, that there was a grant by the original owner and also that the defendants have acquired a right of easement by prescription. But at the trial, the defendants did not rely upon their plea of implied grant. What was pressed during the trial was their plea of acquisition of easement by prescription. But such easement right by prescription cannot be acquired by the defendants against the plaintiff, the defendants and the plaintiff being tenants under the same landlord. Further, the evidence adduced by the defendants to establish acquisition of easement right by prescription is far from satisfactory in the instant case.

*S. A. No. 1532 of 1971.

Cases referred to :—

- (1) *Mani Chander Chakerbutty v. Baikanta Nath Biswas*, ILR 29 Cal. 363
- (2) *Wheaton v. Maple & Co.* 1893 (3) Chancery Division 48
- (3) *Gayford v. Foffatt*, Vol IV Chancery Appeal Cases 133
- (4) *Kilgour v. Gaddes*, 1904 (1) King's Bench Division 457
- (5) *Maharani Rajroop Koer and Syed Abul Hossein and others*, (1880) LR 7 I. A. 240
- (6) *Bholanath Nundi and others v. Midnapore Zemindary Company Ltd. and six others*, (1904) LR 31 IA 75 : 8 CWN 425
- (7) *Tinkori Pathak v. Ram Gopal and others*, AIR 1923 Calcutta 8
- (8) *Nagarentha Mudaliar v. Sami Pillai and another*, AIR 1936 Madras 682
- (9) *Deny v. Saunders*, (1919) 1 KB 223

P. N. Mitter and Satyanarayan Roy for the Appellant
Sakti Nath Mukherji and Tarun Chatterji... .. for the Respondents.

The judgment of the court was as follows :—

This is an appeal against the judgment and decree passed by Shri A.K. Nandy, Subordinate Judge, Asansol, dated 13th May, 1971, in Title Appeal No. 63 of 1970 modifying those of Shri T.B. Deb, Munsif, 2nd Court, Asansol, dated 30th May, 1978 in Title Suit No. 144 of 1968.

2. The plaintiff is the appellant in this court. The plaintiff brought a suit for establishment of title, permanent and mandatory injunction. The suit arises out of a dispute in respect of a drain leading to a tank of the defendants from a village pathway passing over the lands of the plaintiff. The plaintiff is the owner of plot No. 412 on which the plaintiff's residence is situated. On the north-west of this plot there lies a tank on C.S. Plot No. 414 belonging to the defendants. There is a *nullah* arising from the village 'Coolie Rd.' in the south west of plot No. 412 passing over plot No. 412 leading to the tank in plot No. 414. The water of the tank dries up in summer and in order to keep sufficient water the defendants wrongfully and illegally excavated this *nullah* on 11.6.68, and in order to divert the natural flow from north to south by placing an embankment on the road for taking water to the newly constructed *nullah* on plot No. 412. In spite of repeated protests, the defendants did not pay any heed. If the defendants are allowed to take water through the said *nullah*, then the residential house of the plaintiff will be damaged and the plaintiff will suffer irreparable loss.

3. The defence is that the tank on C.S. Plot No. 414 and C.S. Plot No. 412 both belonged to Maharaja of Cossimbazar. The water of the tank is being used for irrigation as well as for household purposes from time immemorial. The surplus water of the village and the high lands to the north during rains flows along the village Cooliepath and enters

into the tank through the disputed *nullah*. The water has been entering into this tank through the *nullah* since time immemorial as this is the only inlet for entering water into the tank. Rameswar Mukherji, the predecessor of the defendants by implied grant from the Maharaja acquired an easement right to draw water along the said *nullah* and to fill the tank. The defendants have also acquired an additional right of easement by prescription to carry water along the said *nullah*. The learned Munsif, on a consideration of the facts, circumstances and the evidence on record, was of opinion that the defendants failed to prove that the disputed *nullah* was in existence from time immemorial or at least for the period of last 20 years. In that view of his finding, the learned Munsif decreed the suit. Being aggrieved, the defendants preferred an appeal before the learned District Judge. The appeal was heard by the learned Subordinate Judge, who, however, found that the defendants could prove acquisition of right of easement by prescription and as such, the learned Subordinate Judge allowed the appeal in part. The plaintiff was granted only a decree for khas possession of the disputed land, subject to the enjoyment of easement right by the defendants. The prayer for injunction, both mandatory and prohibitory, was disallowed. Being aggrieved, the plaintiff has come up to this Court.

4 Mr. P N. Mitter, learned advocate appearing on behalf of the appellant, raises a very important question of law. It is contended that both the plaintiff and the defendants are tenants under the same landlords and that being so, one tenant cannot claim easement right against another. In this connection, Mr. Mitter also submits that the learned Munsif rightly found on evidence that the defendants failed to prove acquisition of right of easement by prescription and the learned court of appeal below was wrong to reverse that finding. In support of the proposition of law indicated by Mr. Mitter, Mr. Mitter relies on some decisions. The first case referred to by Mr. Mitter has been reported in (1) XXIX ILR Calcutta 363 (*Mani Chander Chakerbutty v. Baikanta Nath Biswas*). In this case, it was laid down that "a tenant of land, even having a permanent right of tenancy on the land, cannot acquire an easement by prescription in other land of his lessor". Mr. Mitter submits that if a tenant cannot claim easement right in respect of other land of his lessor, he also cannot claim such a right over the other land of his lessor which is possessed by some other person as a tenant. Mr. Mitter next relies on a decision, reported in (2) 1893 (III) Chancery Division 48 which enunciates the same principle. The next case referred to by Mr. Mitter has been reported in (3) (*Gayford v. Foffatt*), Vol. IV Chancery Appeal Cases 133. In this case, it has been held that "the lessor of an inner close has by necessity a right of way suitable to the business for which the lease was made over an outer close which belongs to the same landlord. But the lessee of one close cannot as such by user acquire an easement over

another close which belongs to the same landlord". Mr. Mitter also wants to get support from the decision, reported in (4) (*Kilgour v. Gaddes*), 1904(1) King's Bench Division 457. It has been held in this case "an easement, such as a right of way, cannot, under section 2 of the Prescription Act, 1832, be acquired by a tenant by user over land occupied by another tenant under the same landlord, even if that user has existed for the period of forty years mentioned in the section."

5. Mr. Sakti Nath Mukherjee, learned advocate appearing on behalf of the respondents, on the other hand, submits that the principle of law on which Mr. Mitter wants to rely, applies in English Law and the same is not applicable to Indian Law. Mr. Mukherjee also submits that according to the provisions of section 4 of the West Bengal Land Reforms Act none is a tenant since the promulgation of the Act and all the persons in occupation of land are owners and that being so, it cannot be said that one tenant is claiming easement right against another tenant. Mr. Mitter repels this argument of Mr. Mukherjee by submitting that the Land Reforms Act came into force in 1956 and the suit was instituted in 1968. That being so, it cannot be said that the defendants, as owners, could claim acquisition of easement right by prescription against the plaintiff who is also owner, as the suit has been instituted in 1968, i. e., within 12 years from the coming into force of the Land Reforms Act. Considering the facts and circumstances of the case, I am of opinion that section 4 of the Land Reforms Act does not come to the help of the respondents. Mr. Mukherjee in the next place, submits that assuming that one tenant cannot claim easement right by prescription against another tenant under the same landlord even then such a right can be claimed on the basis of implied grant. In support of his contention Mr. Mukherjee first relies on a decision, reported in (5) VII Indian Appeals 240 (*Maharani Rajroop Koer And Syed Abul Hossein and others*). Considering the facts of the case, it was held that "under the circumstances the court ought to presume a grant and an agreement between those who were owners of the plaintiff's 'Mahal' and the defendant's land by which the right was created. That being so, the plaintiff does not require the aid of the statute". In the present case, even accepting Mr. Mukherjee's contention that as between two tenants of the same landlord one cannot claim easement right against another on the basis of implied grant it will have to be seen whether the facts and circumstances and the evidence on record justify the court to make such a presumption. Mr. Mukherjee next relies on a decision reported in (6) XXXI Indian Appeals 75, (*Bholanath Nundi and others v. Midnapore Zemindary Company Ltd. and six others*). In this case also, it appeared to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the court finding a legal necessity for the right claimed. Mr. Mukherjee next refers to a

decision, reported in (7) AIR 1923 Calcutta 8, (*Tinkori Pathak v. Ram Gopal and others*). This is a Bench decision and it has been held that "although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor, he may claim a right of easement based on immemorial user, as there is no reason why an owner of land should not grant any privilege he pleases to his tenant. The relationship of landlord and tenant does not render inapplicable the principle, namely, when enjoyment of a right of this description has continued uninterrupted for a long series of years, such enjoyment should be attributed to a legal origin and the Court should presume a grant or agreement. Where the origin of the tenancy is known, but the origin of the right of easement has not been traced the tenancy does not rebut the presumption of a grant which arises upon proof of immemorial use". Mr. Mitter submits that he has nothing to say with regard to the principle of law laid down in the cases, referred to above. But, it is only required to be seen whether in the present case, the defendants have succeeded in making out a case of using the drain from immemorial. The last case, relied on by Mr. Mukherjee has been reported in (8) AIR 1936 Madras 682 (*Nagarentha Mudaliar v. Sami Pillai and another*). It has been held that "even though raiyatwari land is held by several tenants under the Government, one tenant can acquire title by prescription or lost grant against another, for the estate of raiyatwari proprietor is an estate in the soil and possession is with him though the property may be said to be in the Government. The estate of raiyatwari proprietor is also heritable and alienable. He has a sufficient estate to support a grant of an easement. He would be a capable grantor as understood in English Law for the application of the doctrine of lost grant". His Lordship, in coming to this conclusion, relied on (9) *Derry v. Saunders*, (1919) 1 KB 223. Though it has been said that one tenant can acquire title by prescription or lost grant against another tenant both under the Government, yet on the principles of law enunciated in the cases, referred to above, I am of opinion that though one tenant can claim right of easement against another tenant on the basis of implied grant he cannot claim right of easement against another tenant on the basis of prescription.

6. True, in the present case, in the written statement, the defendants have stated that Rameswar Mukherji by implied grant from the Maharaja acquired an easement right to draw water along the Nullah and to fill the tank. The said Rameswar Mukherji and after his death, his legal heirs, i.e., the defendants, have been filling up the tank with water flowing through the said drain continuously for more than 20 years, peaceably, as of right, openly and as an easement the defendants have, thus, acquired an additional right of easement by way of prescription to carry water along the said nullah. Thus, it is seen that the defendants made out a case that there was a grant by the original owner and also

that the defendants acquired right of easement by prescription. I find from the judgment of the learned court of appeal below that the defendants did not rely upon their plea of implied grant. What was pressed during the trial was their plea of prescription. As I have already found that the defendants and the plaintiff being tenants under the same landlord, the defendants cannot claim right of easement by prescription against the plaintiff. I also find that the evidence adduced by the defendants to prove acquisition of right by prescription is far from satisfactory and the learned Munsif rightly rejected the said evidence and the court of appeal below has reversed the findings of the learned Munsif and has rejected the evidence of the plaintiff without cogent reason. This being the position, the judgment passed by the learned court of appeal below cannot be sustained.

7. In the result, the appeal is allowed on contest. The judgment and decree passed by the learned court of appeal below are set aside and those of the learned Munsif are restored. There will be, however, no order for costs in this appeal.

S. P. M.

[CRIMINAL REVISIONAL JURISDICTION]

Before Mr. Justice Purna Chandra Barooah and Mr. Justice

Sunil Chandra Majumdar

Decision : June 5, 1978

Henry Ah Hoc & Anr. ...

... **Petitioners**

Versus

State of West Bengal & Anr....

... **Opposite Parties***

**Prevention of Food Adulteration Act (37 of 1954)—Offences under—
Prevention of Adulteration of Food, Drugs and Cosmetics (W. B. Amend-
ment) Act 1973—Proceeding started under W. B. Amendment Act—Pre-
vention of Food Adulteration (Amendment) Act 1976 becoming effective
from 1.4.76—Effect thereof in respect of proceeding initiated under West
Bengal Amendment Act 1973—General Clauses Act (10 of 1897), Sec. 6—
Where it is to be attracted.**

Here the question is : whether a prosecution launched under the provisions of the Food Adulteration Act 1954 (Principal Act) after the corresponding State Act had become applicable to the State of West Bengal after the assent of the President was first published in the Calcutta Gazette (Extra Ordinary) on 29.4.74 and which had not been concluded, would continue to be governed by the Principal Act as amended by the State Act after the Prevention of Food Adulteration (Amendment) Act 1976 come into force on 1.4.76.

**Criminal Revision Case No. 133 of 1978.*

HELD : Adulteration of Food Staffs and other goods' being an entry in the concurrent List of the Seventh Schedule of the Constitution, once the Presidential assent was obtained and published on 29.4.74, the Prevention of Food Adulteration Act stood modified by the State Act in its application to West Bengal by virtue of Article 254(2) of the Constitution. Even after coming into force of the State Act, the Parliament has the right by virtue of the Proviso to Article 254(2) of the Constitution to enact any law with respect to the same subject matter.

By the Prevention of Food Adulteration (Amendment) Act 1976, the Parliament amended further the provisions of the Principal Act. Although in the said Central Amendment Act there is no reference whatsoever to the State Act, it cannot be disputed that the two Acts are in respect of the same subject matter and cover the same field and that being so, the provisions of the Central Amendment Act, which is a latter legislation, would prevail over the provisions of the State Act which shall be deemed to be impliedly repealed.

It appears that it was the intention of the Parliament by enacting the Central Amendment Act to discontinue the further operation of the State Act, as the provisions in the former Act are incompatible with the provisions of the State Act.

A repealed statute and the consequences following therefrom can be kept alive, in the absence of a saving clause in the repealing statute by virtue of section 6 of the General Clauses Act. Where the provisions of section 6 of the said Act does not apply due to manifestation of the contrary intention in the repealing statute, the repealed statute shall be deemed to have been obliterated from the statute book for all intents and purposes.

After the Prevention of Food Adulteration (Amendment) 1976 came into force on 1.4.76, all proceedings which were pending under the Principal Act as amended by the State Act and had not been concluded, would cease to be governed by the State Act and would come under the provisions of the Principal Act as amended by the Central Amendment Act. Therefore, in the instant case the order of the learned Magistrate holding that the case is triable by the Court of Sessions is not in accordance with law and a direction is being given that the learned Magistrate should try the case himself under the provisions of the Principal Act as amended by the Central Amendment Act.

• **Cases referred to :—**

- (1) *Bansidhari Manna v. State of W. B.*, 1977 (2) CLJ 219 ; 1977 CHN 745
- (2) *Zaverbhai Amaldas v. State of Bombay*, AIR 1954 SC 752
- (3) *Deep Chand & Ors. v. State of Uttar Pradesh and others*, AIR 1959 SC 648
- (4) *State of Orissa & Another v. M. A. Tulloch & Co. & Another*, AIR 1964 SC 1284
- (5) *State of Punjab v. Mohar Singh Pratap Singh*, AIR 1955 SC 84

Balai Chandra Ray and Alope Kumar Sengupta... ...for the petitioners
J. N. Ghosh and Pradip Kumar Ghosh ...for the Corporation of Calcutta
B. N. Mitra. P. P. and A. K. Goswami ...for the State
Nalin Chandra Banerjee and Dilip Kumar Dutta as Interveners

The judgment of the Court was as follows :—

Borooah, J. : On the basis of a complaint filed on September 24, 1975 by the opposite party No. 2, a Food Inspector of the Corporation of Calcutta, the petitioners along with Messrs. Chungwah Restaurant of No. 13/A, Chittaranjan Avenue are being prosecuted in the court of the Senior Municipal Magistrate, Calcutta, in Case No. 232-D of 1975 under section 16(1) (a) of the Prevention of Food Adulteration Act, 1954 as amended by Act XLIX of 1964 read with section 7 of the said Act on the allegations that they had stored/exposed for sale and/or used "Hycinth's Ground white Pepper (Compound), with fried rice powder" for the purpose of manufacturing/preparing different articles of food and which was adulterated and misbranded as the sample seized by the said opposite party on August 16, 1965 was found on analysis by the Public Analyst to contain no rice powder but wheat powder.

2. After the learned Magistrate had taken cognizance an objection was raised by the Prosecution that as the alleged offence was committed after the Prevention of Adulteration of Food, Drugs and Cosmetics (West Bengal Amendment) Act, 1973 (hereinafter referred to as the State Act) had come into force prescribing upto life imprisonment as punishment for the offence, the case should be committed to the Court of Sessions. The learned Magistrate by an order dated June 16, 1977 over ruled the objection but subsequently on December 27, 1977 on his attention being drawn to a decision of A.K. Sen, J : in the case of (1) *Bansidhari Manna v. The State of West Bengal*, (1977 (2) CLJ 219), inspite of the objection raised on behalf of the petitioners that he cannot reverse his earlier order, the learned Magistrate held that the case was exclusively triable by the court of Sessions. This order has been impugned in this Rule.

3. The question which arises for determination in this case and the other cases which have been listed for analogous hearing is whether a prosecution launched under the provisions of the Food Adulteration Act, 1954 (hereinafter the Principal Act) after the State Act had become applicable to West Bengal after the assent of the President was first published in the Calcutta Gazette Extraordinary on April 29, 1974 and which had not been concluded, would continue to be governed by the Principal Act as amended by the State Act after the Prevention of Food Adulteration (Amendment) Act, 1976 (hereinafter the Central Amendment Act) came into force on April 1, 1976 ?

4. In support of this Rule we have heard the submissions of Mr. Balai Chandra Ray. Other learned Advocates, who are appearing in cases pending before us where the identical question of law is involved,

have been permitted to intervene. Mr. Ray has argued that Central Amendment Act is an amendment of the Principal Act and not an amendment of the State Act. By the Central Amendment Act Parliament has made a law which Parliament was competent to enact in connection with matters enumerated in the concurrent list. Section 6 of the State Act being entirely repugnant to the Central Amendment Act, the effect of such repugnancy under Article 254 (1) of the Constitution is that the State Act would become void with the enforcement of the Central Amendment Act on April 1, 1976 and under Article 254 (2) of the Constitution it would cease to have any manner of application as the Central Amendment Act is a later statute. Mr. Ray had then submitted that the word "void" appearing in Article 254(1) of the Constitution is not synonymous with the word "repeal" and when a transaction is void, it becomes non-existent from its very inception and there is a ban against its recognition. Mr. Ray further argued that the decision of A.K. Sen, J. in the case of *Bansidhari Monna v. The State of West Bengal* (supra) was not correct and the learned Judge did not notice that the Central Amendment Act clearly expressed a contrary intention against the continued operation of the State Act after April 1, 1976.

5. Mr. Nalin Chandra Banerjee, has also submitted that the provisions of the Central Amendment Act and in particular section 13, which has inserted a new section, viz 16A, after section 16 of the Principal Act, rules out the applicability of section 6 of the General Clauses Act and establishes beyond doubt that the Central Amendment Act is retrospective and that the rights acquired and the liabilities incurred under the State Act are neither preserved nor protected.

6. Mr. Dilip Kumar Dutta, submitted that after the passing of the Central Amendment Act the State Act must be deemed to be impliedly repealed, and it must accordingly be considered to be a law that never existed except for the purpose of action which were commenced, prosecuted and concluded whilst it was an existing law. Mr. Dutta has also submitted that the concept of retrospective operation of the Central Amendment Act need not be invoked as the Central Amendment Act contained enough indications of a contrary intention not to save any proceeding initiated under the State Act.

• 7. Mr. J. N. Ghosh, appearing on behalf of the Corporation of Calcutta, has submitted that the proceedings under the Principal Act as amended by the State Act, when instituted, were in accordance with law and a proceeding which was legal of its inception cannot become void after the repeal of the State Act in the absence of any specific provision to that effect in the repealing Act.

8. Mr. Pradip Kumar Ghosh, also appearing on behalf of the Corporation of Calcutta, submitted that the word "void" and "void

•*ab initio*” are two different expressions. Void means prospectively void and void *ab initio* means void from its very inception, or in other words, retrospectively void ; the word void as used in Article 254 (1) of the Constitution conveys the meaning that it would be unenforceable from the relevant date. Mr. Ghosh further argued that a repugnant law can no longer be enforced from the date it becomes repugnant but it is not *ab initio* void and does not become non-est or non-existent and continues to be good law even after the date of repugnancy. Mr. Ghosh also submitted that applying the doctrine of implied repeal and relying on the language of Article 254(1) of the Constitution, the conclusion that seems to be inescapable is that the West Bengal Act became inoperative with the coming into force of the Central Amendment Act but if the offence was committed between the 29th April, 1974 and the 1st April, 1976 the West Bengal Act would remain valid and the prosecution and trial would be governed and punishment would be imposed under the provisions of the State Act.

9. Mr. Biren Mitra, the Public Prosecutor, appearing on behalf of of the State, has argued on completely different lines. According to his submission, ‘cosmetics’ being an item neither in the State List nor in the concurrent list of the 7th Schedule of the Constitution, the State Act is beyond the legislative powers of the State Legislature and as such is *ultra vires* the Constitution. We do not agree with Mr. Mitra’s submission but refrain from entering into a detailed discussion as no useful purpose will be served because of the view we are taking in this case.

“Adulteration of Food Stuffs and other goods” being an entry in the Concurrent List of the 7th Schedule of the Constitution, once the Presidential assent was obtained and published on April 29, 1974 the Principal Act stood modified by the State Act in its application to West Bengal by virtue of Article 254(2) of the Constitution. Even after the coming into force of the State Act, Parliament had the right by virtue of the proviso to Article 254(2) of the Constitution to enact any law with respect to the same subject matter.

10. By the Central Amendment Act Parliament further amended the provisions of the Principal Act. Although in the Central Amendment Act there is no reference whatsoever to the State Act, it cannot be disputed that the two Acts are in respect of the same subject matter and cover the same field and that being so, the provisions of the Central Amendment Act, which is a later legislation, will prevail over the provisions of the State Act which shall be deemed to be impliedly repealed. In this connection the decision of the Supreme Court in the case of (2) *Zaverbhai Amaidas v. State of Bombay* (AIR 1954 SC 752) may be referred to.

11. The next question that has to be determined is what would

be the effect of such repeal on the pending proceedings under the Principal Act as amended by the State Act.

12. According to the Supreme Court in the case of (3) *Deep Chand & Ors. v. The State of Uttar Pradesh and others* AIR 1959 SC 648 and (4) *The State of Orissa & Another v. M. A Tulloch & Co. & another* (AIR 1964 SC 1284), in the case of implied repeal of a Statute by a Central Act, section 6 of the General Clauses Act is attracted. But on a reading of section 6 of the said Act it is clear that the condition precedent to the application of the provisions of the aforesaid section is the non appearance of a contrary intention in the repealing Act. Therefore, it has to be ascertained whether any contrary intention appears in the Central Amendment Act.

13. As to how a repealing Statute should be assessed to ascertain whether the consequences of section 6 of the General Clauses Act would be attracted or whether the intention to the contrary appears therein, has been laid down by the Supreme Court in the case of (5) *The State of Punjab v. Mohar Singh Pratap Singh* (AIR 1955 SC 84).

The Supreme Court in the said case observed as follows :—

“The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the Section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material”

14. In the light of the aforesaid principles we have to examine the provisions of the Central Amendment Act to ascertain whether it manifests an intention contrary to the further continued operation of the State Act. That a contrary intention does appear will be apparent from the following discussion.

15. Section 6 (ii) of the State Act provided punishment upto life imprisonment by making necessary changes in sub-section (1) of section 16 of the Principal Act. This could result in undue harshness especially in the case of a simple or technical adulteration. The Central Amendment Act brought about a change in this position and graded and rationalised the punishment according to the severity of the offence. For instance, under the proviso to section 16 (1A) (ii), as inserted in the Principal Act by section 12 of the Central Amendment Act, if an article of food or an adulterant when consumed by any person was likely to cause his death, or was likely to cause such harm on his body as would amount to grievous hurt within the meaning of section 320 of the Indian

Penal Code, the punishment would be for a term which would not be less than three years but which could extend to a term for life and with fine which shall not be less than five thousand rupees.

16. The new section 16A which was added to the Principal Act by section 13 of the Central Amendment Act, provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973 all offences under sub-section (1) of section 16 shall be tried in a summary way by a Judicial Magistrate of the First Class specially empowered in this behalf by the State Government or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the Code as far as may be, shall apply to such trial. This new section 16A brought about a radical change in the forum of trial. Instead of having to face a Sessions trial when the West Bengal Act was in force, the hardship on an accused was ameliorated to a considerable extent by making it possible for offences coming under section 16(1) to be tried summarily after the coming into force of the Central Amendment Act. This in our view clearly evinces a contrary intention.

17. That it was the intention of Parliament that the operation of the State Act should not be continued could also be gathered from the following ;

18. The State Act did not amend, repeal or make any reference to section 21 of the Principal Act. The said section reads as follows :-

“Notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898 it shall be lawful for a Presidency Magistrate or any Magistrate of the First Class to pass any sentence authorised by this Act in excess of his powers under section 32 of the Code”.

19. The effect of this section on the Principal Act as amended by the State Act would be that a Magistrate would be empowered to pass a sentence of imprisonment for life. This has been corrected by section 19 of the Central Amendment Act which has substituted a new section 21 in the Principal Act and which is in the following terms :—

“Notwithstanding anything contained in section 29 of the Code of Criminal Procedure 1973, it shall be lawful for any Metropolitan Magistrate or any Judicial Magistrate of the First class to pass any sentence authorised by this Act, except a sentence of imprisonment for life or for a term exceeding six years, in excess of his powers under the said section”.

20. In the Central Amendment Act there is no provision corresponding to section 6(iv) of the State Act which added a new section 19A to the Principal Act shifting the burden of proof on a person from whom an article of food has been seized to establish that it is not adulterated or misbranded.

21. It is thus clear from the aforesaid discussion that it was the

intention of Parliament by enacting the Central Amendment Act to discontinue the further operation of the State Act, as the provisions in the former Act are incompatible with the provisions of the State Act.

22. A repealed Statute and the consequences following therefrom can be kept alive, in the absence of a saving clause in the repealing statute by virtue of section 6 of the General Clauses Act. Where the provisions of section 6 of the said Act does not apply due to manifestation of a contrary intention in the repealing statute, the repealed statute shall be deemed to have been obliterated from the Statute book for all intents and purposes. As the Supreme Court observed in the aforesaid case of *The State of Punjab v. Mohar Singh Pratap Singh* :

“Under the law of England, as it stood prior to the Interpretation Act, of 1889, the effect of repealing a Statute was said to be to obliterate it as completely from the records of Parliament as it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law : Vide Craieses on Statute Law, 5th Edn. page 323. A repeal therefore without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right, Vide Crawford on Statutory Constitution, pp. 599-600. To obviate such results a practice came into existence in England to insert a saving clause in the repealing Statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment. Later on, to dispense with the necessity of having to insert a saving clause on each occasions, section 38(2) was inserted in the Interpretation Act of 1889 which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed. Section 6 of the General Clauses Act, as is well known is on the same lines as section 38(2) of the Interpretation Act of England”.

23. For the aforesaid reasons the views expressed by A.K. Sen, J : in the case of *Bansidhari Manna v. The State of West Bengal*, (supra) that a contrary intention does not appear in the Central Amendment Act and the consequences which according to the learned Judge followed by such non application cannot be accepted.

24. In the result, we must hold that after the Prevention of Food Adulteration (Amendment) Act, 1976 came into force on April 1, 1976 all proceedings which were pending under the Principal Act as amended by the State Act and had not been concluded would cease to be governed

• by the said Act and would come under the provisions of the Principal Act as amended by the Central Amendment Act. Therefore, in the instant case, the order of the learned Magistrate holding that the case is triable by the Court of Sessions is not in accordance with law and we direct that the learned Magistrate should try the case himself under the provisions of the Principal Act as amended by the Central Amendment Act.

Rule made absolute.

Majumdar, J. : I agree.

T. K. M.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Sankar Prasad Mitra, Chief Justice and

Mr. Justice Salil Kumar Datta

Decision : February 10, 1978

Rajani Kanta Hazra Petitioner

Versus

Junior Land Reforms Officer & Ors. Respondents*

West Bengal Estates Acquisition Act 1953 (1 of 1954), Sec. 2(h)—Incumbrance—Whether barga right is an incumbrance—When vesting takes place it takes place without barga right, an incumbrance—Unnecessary to rely on Sec. 161(a) of B. T. Act 1885.

The point for determination is, whether a barga right is an 'incumbrance' within the meaning of Section 2(h) of the West Bengal Estates Acquisition Act 1953. If it is held that it is an 'incumbrance', then the vesting was free from this incumbrance and the State of West Bengal was at liberty to distribute the land in question to other cultivators.

HELD : From the definition of incumbrance it is clear that the rights of a raiyat or an under-raiyat or a non-agricultural tenant are not included within the definition of 'incumbrance'. But 'incumbrance' includes all other rights or interests of whatever nature barring the land allowed to be retained by an intermediary. The definition is of widest amplitude. It does not give protection to any one except raiyats, under-raiyats, non-agricultural tenants and to lands allowed to be retained by an intermediary under section 6 of the West Bengal Estates Acquisition Act. A barga right is not entitled to any protection and is an 'incumbrance' and when the vesting took place, it took place without the barga right.

Cases referred to :—

- (1) *Mad. Kalu Molla v. State of West Bengal*, an unreported decision of P. K. Banerjee, J. dated 10.3.75 in CR no. 601(w) of 1973.
- (2) *Bhusan Chandra Giri v. State of West Bengal*, an unreported decision of Amiya Kumar Mookerji, J. in CR no. 2182(w) of 1972

*C.R. no. 3358 (w) of 1971.

(3) *Sasadhar Gayen v. J. L. R. O., Gosaba*, 1974 (1) CHN 44

(4) *Gobinda Prasad Jana v. J. L. R. O., Patashpur*, an unreported decision of Anil Kumar Sen, J. in CR no. 3844 (w) of 1970

(5) *State of West Bengal v. Sudhir Chandra Ghosh*, AIR 1976 SC 12599
Mrs. Sipra Sarkar for the Petitioner
Swadesh Bhusan Bhunia and Ranjit Kumar Roy ... for the Opposite parties

The judgment of the Court was as follows :—

Mitra, C. J. : This Rule has been referred to a larger Bench by Mr. Justice M.N. Roy on the 5th April, 1977.

2. The petitioner in an application under Article 226 of the Constitution has sought to impeach the attempt of the respondent, Junior Land Reforms Officer, Kukrahati, Midnapore, to distribute 37 acres of land out of lands held by the petitioner to other settlees who are respondents nos. 4 and 5.

3. The petitioner's case is that at all material times he was, and still is, a bargadar in respect of 74 acres of land, situate at Mouza Iswardaha. The petitioner and his brother have cultivated the said land in equal half share under the erstwhile landlord, Bhabani Charan Mitra. The landlord, admittedly, held lands above the ceiling fixed by the West Bengal Estates Acquisition Act, 1953.

4. The respondents in their affidavits-in-opposition have admitted that the petitioner was a bargadar. They have also admitted that the petitioner was recorded as a bargadar before the vesting of the land. They have admitted further that the petitioner deposited necessary fees, like others, for obtaining licence in respect of the land but the fees were received subject to the approval of the authorities concerned.

5. The petitioner has stated that he has paid rents upto 1968 for which the necessary dakhilas have been granted. The petitioner's allegation is that on the 8th Shravan, 1371 B.S., while he was cultivating the land, the respondents nos. 4 and 5 entered upon the land and obstructed his cultivation. The respondents Nos. 4 and 5 intimated the petitioner that they had obtained necessary licences from the appropriate authorities for cultivating the land.

6. The petitioner thereupon went to the office of the Junior Land Reforms Officer and came to know that after the vesting, agricultural lands, mentioned in the petition, have been distributed to the respondents nos. 4 and 5. According to the petitioner, such settlement or distribution is wholly unauthorised, irregular and illegal and is without jurisdiction.

7. The point that arises for our consideration is, whether a barga right is an 'incumbrance' within the meaning of section 2(h) of the West Bengal Estates Acquisition Act, 1953. If we hold that it is an 'incumbrance', then the vesting was free from this 'incumbrance' and the State

of West Bengal was at liberty to distribute the land in question to other cultivators.

8. Various decisions were relied on before Mr. Justice M.N. Roy. There is an unreported judgment of Mr. Justice P.K. Banerjee in (1) C.R. 601 (w) of 1973 (*Mohd Kalu Molla v. State of West Bengal*) delivered on the 10th March, 1975. The petitioner in that case was in possession of lands for which he held rent receipts. An attempt was made to evict the petitioner. A Rule was obtained. Mr. Justice Banerjee held that the Rule must succeed to the extent that the petitioner's land could not be settled to any other person until the petitioner was evicted in due course of law or by any other legislative process.

9. There is another unreported decision of Mr. Justice Amiya Kumar Mookerji in (2) C.R. 2182 (w) of 1972 (*Bhusan Chandra Giri v. State of West Bengal and others*). Here the petitioner's case was that he was a bargadar and his name had been recorded as such in the record of rights but the respondents were trying to evict him without any legal process. Learned advocate for the petitioner contended that barga right was not an 'incumbrance'. Considering the facts and circumstances of the case, Mr. Justice Amiya Kumar Mookerji directed the respondents not to evict the petitioner without taking recourse to law.

10. In (3) *Sasadhar Gayen and others v. Junior Land Reforms Officer, Gosaba and others*, reported in 1974 (1) CHN., 44, Mr. Justice M. M. Dutt had to deal with the points raised before us more specifically. His Lordship has held that the interests of bargadars are 'incumbrances' within the meaning of the term as defined in section 2(h) of the West Bengal Estates Acquisition Act, 1953, and along with the vesting of the disputed land or the vesting of the interests of the intermediaries, namely the trustees to the estate of Sir Daniel Hamilton, the interest of the petitioners who were bargadars under the intermediaries, also vested in the State as 'incumbrances'. Mr. Justice Dutt has observed that the petitioners in that case had no legal right to continue in possession of the disputed land and the State Government had the right to take possession of the same and settle the same with others.

11. The same view was taken by Mr. Justice Anil Kumar Sen in an earlier decision in (4) (*Gobinda Prasad Jana v. Junior Land Reforms Officer, Patashpur & Ors.*) CR 3844(W) of 1970.

12. Mr. Justice M. N. Roy was of the view that on the point raised in this petition, this Court's opinions did not appear to be uniform. And that is why Mr. Justice M. N. Roy has referred the matter to a large Bench.

13. We have gone through the four judgments referred to above. It seems to us that neither Mr. Justice P. K. Banerjee nor Mr. Justice Amiya Kumar Mookerji decided expressly that a barga right was not an

'incumbrance' and, therefore, the bargadar could continue to cultivate the land held under the barga even after the vesting of the land under the West Bengal Estates Acquisition Act, 1953. The point in question specifically arose both before Mr. Justice Anil Kumar Sen and Mr. Justice M. M. Dutt and both the learned Judges expressed their views against the bargadars.

14 Let us now read section 2(h) of the West Bengal Estates Acquisition Act, 1953. It runs thus :

"Section 2.

In this Act unless there is anything repugnant in the subject or context,—

(h) "incumbrance" in relation to estates and rights of intermediaries therein does not include the rights of a raiyat or of an under-raiyat or of a non agricultural tenant, but shall, except in the case of land allowed to be retained by an intermediary, under the provisions of section 6, include all rights or interests or whatever nature belonging to intermediaries or other persons, which relate to lands comprised in estates or to the produce thereof."

15. From the definition it is clear that the rights of a raiyat or an under-raiyat or a non-agricultural tenant are not included within the definition of 'incumbrance'. But 'incumbrance' includes all other rights or interests of whatever nature barring land allowed to be retained by an intermediary. The definition is of widest amplitude. It does not give protection to anyone except raiyats, under-raiyats, non-agricultural tenants and to lands allowed to be retained by an intermediary under section 6. A barga right is not entitled to any protection and is an 'incumbrance' and when the vesting takes place, it takes place without the barga right.

16. The Supreme Court has recently considered the scope of the definition of 'incumbrance' in (5) *State of West Bengal v. Sudhir Chandra Ghose*, AIR 1976 SC 2599. In this case, cattle-grazing rights were under consideration. The Supreme Court has said that the vesting of estates in the State under Section 3, 4 and 5 extinguishes the rights of cattle grazing which the villagers enjoy in the grass lands of such estates. Such right amounts to 'incumbrance' within section 2 (h). Indubitably says the Supreme Court, the right to graze cattle in an estate is a restrictive interest clearly falling within the scope of section 2(h). The Supreme Court has observed in paragraph 5 at page 2600.

"Indeed, so designedly limitless an area of rights and interests of whatever nature is included in the special definition of 'incumbrance' for the purposes of the Act, that to deny the familiar rurally enjoyed right of pasturage as conveyed by it is to defect, by judicial construction, the legislative intendment."

17. In the opinion of the Supreme Court, therefore, the expression "all rights or interests of whatever nature" indicates limitless area of rights or interests. In other words, excepting the rights or interests expressly excluded by the definition, all other rights or interests relating to lands comprised in estates or to the produce thereof arising from any source whatsoever would be treated as an 'incumbrance' within the meaning of the Act.

18. Mrs. Sarkar, appearing for the petitioner, drew our attention to section 2(p) of the Act. According to this clause, expressions used in the Act and not otherwise defined have in relation to the areas to which the Bengal Tenancy Act, 1885, applies, the same meaning as in that Act and in relation to other areas meaning as similar thereto as the existing law relating to land tenures applying to such areas, permits.

19. Mrs. Sarkar wanted to rely on the definition of 'incumbrance' in section 161(a) of the Bengal Tenancy Act, 1885. It says :

"(a) the term 'incumbrance' used with reference to a tenancy means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in section 160".

20. Mrs. Sarkar's point is that "all rights or interests of whatever nature" have not been defined in the West Bengal Estates Acquisition Act, 1953. We have, therefore, to look to the definition of 'incumbrance' in section 161(a) of the Bengal Tenancy Act, 1885, to determine what is meant by "all rights or interests of whatever nature". And since a barga right has not been mentioned in section 161(a) of the Bengal Tenancy Act, 1885, it cannot be an 'incumbrance' under the West Bengal Estates Acquisition Act., 1953.

21. It seems to us that for the definition of 'incumbrance' we are not required to rely on any provision of the Bengal Tenancy Act, 1885 in view of the definition of 'incumbrance' in section 2(h) of the West Bengal Estates Acquisition Act, 1953. We are required to construe the expression "all rights or interests of whatever nature" used in section 2(h). And our construction is, as we have already stated, that excepting rights or interests expressly excluded, no other rights or interests would escape the ambit of the definition of 'incumbrance' in Section 2(h). For the same reason, we are not required to take into consideration the definition of 'incumbrance' in section 2(6A) of the West Bengal Land Reforms Act, 1955. This definition was brought into force for the purpose of the Land Reforms Act only.

22. For all the reason aforesaid as the petitioner has come to this court only on the basis that he is a bargadar and his interest has not vested in the State, this application must fail.

23. The Rule is discharged. Interim orders, if any, are vacated. There will be no order as to costs.

24. The petitioner will be at liberty to make an application within a month from this date to the appropriate authorities for settlement of the lands which are the subject-matter of this application in favour of the petitioner, as prayed for, and the appropriate authorities would deal with the application according to law. The application, however, would have to be made within a month from date.

Datta, J. : I agree.

P.R.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Amiya Kumar Mookerji

Decision : May 12, 1978

Gourpada Banerjee

Versus

Petitioner

State of West Bengal & Ors.

Respondents*

West Bengal Service Rules, Part I—Rule 75(aa)—Impugned order made by I. G., Police on recommendation of Review Committee—Recommendation of Review Committee, not based on criteria laid down in 1973 Memorandum—Procedure laid down in Bengal Secretariate Manual followed—Effect thereof—Where reasons for compulsory retirement may not be given—Whether such order can be made by appointing authority on subjective satisfaction—Materials germane to compulsory retirement should be basis of recommendation of Review Committee to appointing authority for taking action.

In this Rule, the order of compulsory retirement of the petitioner made by the Inspector General of Police in exercise of his powers under Rule 75(aa) of the West Bengal Service Rules (Part I) has been challenged.

HELD : The Review Committee did not consider the petitioner's case according to the criteria laid down in the 1973 Memorandum. It is true that the absence of any grounds or reasons does not invalidate an order of compulsory retirement. But at the same time either in the recommendation of the review committee or in the requisite opinion formed by the appointing authority there must be an indication that such recommendation or opinion was formed on the basis of some materials germane to the issue that the government servant shall retire compulsorily in the public interest.

Where it appears from the Minutes of the Review Committee that it had considered about the physical fitness, mental alertness, integrity and efficiency of a particular officer on reference to some of the adverse remarks recorded in the confidential file of that officer which are relevant to form

*C. R. No. 13433 (w) of 1975

the opinion that the said officer shall retire in the public interest, in that case simple acceptance of the recommendation would be sufficient compliance with the rules. No independent opinion is required to be formed by the appointing authority inasmuch as the recommendation itself is clear, explicit and germane to the issue.

When an elaborate procedure has been laid down for retiring a government servant under Rule 75(aa), in that case procedure laid down in paragraph 29 of the Bengal Secretariate Manual by appending one's signature without noting anything, would not be in compliance with the requirement of the guidelines.

In the instant case, the materials, placed before the court do, not indicate that the Review Committee did consider any relevant material and on the basis of such materials recommended premature retirement of the petitioner. It is well settled that the court has jurisdiction to examine the grounds or materials germane to the issue of compulsory retirement. In the absence of relevant materials there could not be any formation of opinion by the appointing authority that the petitioner should retire under Rule 75(aa) of the West Bengal Service Rules, Part I. Accordingly the impugned order is liable to be quashed

Cases referred to :—

- (1) *S. K. Mitra v. Commissioner of Presidency Division*, 80 CWN 697
- (2) *A. C. Bose v. Union of India*, 1974 CLJ 8
- (3) *Krishena Kumar v. S. P. Saksena*, AIR 1973 SC 1065

Bhagapati Prasad Banerjee ... for the Petitioner
Nara Narayan Gooptu and Anwar Hossain ... for the Respondents

The judgment of the Court was as follows :—

This Rule is directed against an order of compulsory retirement of the petitioner dated 25th of October, 1976 passed by the Inspector General of Police under Rule 75 (aa) of the West Bengal Service Rules, Part-I.

2. Petitioner joined as a Sub-Inspector of Police in the month of January, 1944. Thereafter, he was promoted to the post of Inspector of Police in May, 1959 and subsequently, confirmed in December, 1964. For an incident which took place in February, 1973, when some Naxalites broke open the door of a Gun Dealer's shop at Raigunj and looted arms and ammunitions, the petitioner was suspended from service on the ground that he failed to exercise supervision over his subordinates. Against the said order of suspension, he moved this Court on 11th of March, 1974 and obtained a Rule (1610 (w) of 1974) and also an interim order. The said Rule is now pending in this Court. Pursuant to the interim order, the petitioner was released from suspension and posted as Senior Adjutant, Home Guards, Balurghat, West Dinajpur. Towards the latter part of 1973, the petitioner was served with a copy of an

adverse entry in the Annual Confidential Report for the year ending 1972 wherein the following remarks were recorded :—

“An inefficient Circle Inspector. He could not get work from the Officers working under him. Position of pending cases in his Circle is simply alarming. Does lot of touring but it seems without any effect. He should work hard to go further up in future.”

3. Towards the middle of 1974, he was served with a copy of another adverse entry in his Annual Confidential Report for the year ending 31st March, 1973 wherein the following remarks were recorded :—

“Worked as CI Raigunj where his performance was most unsatisfactory. Had no attachment for the post, but was always keen to get out of the Circle and posted in Howrah District. His control over his subordinates was ineffective. He was found very inactive and lacking initiative. His supervision over crime control and law and order maintenance was very bad. During arms looting which took place in Raigunj town area in February, 1973, he was found utterly irresponsible. He came to know about the incident much latter on. This particular case showed very poor supervision on his part”.

4. It is alleged by the petitioner that those adverse remarks were made malafide and vindictively as a counter blast to the petitioner's writ application in this Court. In the meantime, the petitioner was superseded by many of his juniors. He made representation to the Inspector General of Police and also to the Secretary, Home (Police) Department, requested them to consider his case for promotion and having found that the said respondents did not consider the petitioner's representation, he made another application under Art. 226 of the Constitution on or about 28th February, 1975 against his illegal supersession by his juniors. That Rule being Civil Rule No. 8687 (w) of 1975 is pending. An interim order was also granted to the effect that all promotions made would be subject to the result of the Rule. Sometime in November, 1973, a charge-sheet was issued to the petitioner. A departmental enquiry on the basis of the said charge-sheet is now pending and the same has been stayed by this Court. On 9th July, 1976 adverse remarks for the year 1975-76 was communicated to the petitioner. The said remarks run as follows ;—

“He did not give a good account of himself. Did not take any initiative in training of fresh recruits and for organizing any refresher course.”

Against the said adverse remarks, the petitioner duly submitted representation to the IG of Police. On or about 30th November, 1976 the petitioner received the impugned order whereby he was to be retired from service under Rule 75 (aa) of the West Bengal Service Rules, Part-I. Along with the said order, a cheque for an amount equivalent to 3 months pay

and allowances was also given to the petitioner in lieu of notice. The said order was given effect to on and from 1st November 1976. It is alleged in the petition that the impugned order of compulsory retirement is illegal and mala fide inasmuch as the same was not passed in public interest and there was no bona fide grounds and/or reason behind the said order. It is stated in the petition that the order of compulsory retirement during the pendency of the departmental proceeding on the face of it, indicates that the same was passed by way of punishment which the respondents decided to impose upon the petitioner on the basis of the departmental proceeding on the alleged charges. The petitioner being aggrieved by the impugned order moved this Court under Art. 226 of the Constitution and obtained the present Rule.

5. An affidavit-in-opposition has been filed on behalf of the respondents 1-6 and affirmed by Nipendra Chandra Paul, the Deputy Inspector General of Police, Head Quarters, West Bengal wherein it is stated that the case of the petitioner was reviewed after his attainment of 55 years in accordance with the Memorandum dated 15-5-73 and he was found not suitable to continue upto the age of 58 years for better efficiency in the public interest. The said order of compulsory retirement has no nexus with the departmental proceedings and neither the said order was passed by way of any punishment.

6. The record of the review committee was produced before me wherein it is stated "As regard Serial No. 10 Sri Gourpada Banerjee & ors.....records are poor and their performance in the posts held by them during the last 5 years had been poor. The Review Committee is of the opinion that they are unsuitable for continuance in service and recommends that they should be retired compulsorily after they have completed the age of 55 years."

7. On the basis of the said recommendation, the appointing authority, the Inspector General of Police, did not form any independent opinion, but he simply accepted the recommendation of the committee for the premature retirement of the petitioner.

8. Mr. Banerjee, appearing on behalf of the petitioner urged only one point, that the appointing authority did not form any independent opinion on the basis of the materials germane to the issue that the petitioner should be retired compulsorily in the public interest.

9. Mr. Gooptu, appearing on behalf of the respondents contended that the formation of the opinion is not required to be expressed in a particular form inasmuch as it is not enjoined by the instructions or the guidelines that the opinion should be supported by any reasons or ground. According to him, absence of grounds or reference to any fact or material does not necessarily mean that no bona fide opinion was formed by the appointing authority. In this connection, he referred to an extract

from the West Bengal Secretariate Manual. Paragraph 29 of the said Manual provides that, when an officer agrees with the proceeding note or recommendation he will append his signature without noting. In such circumstances the note will be regarded as if it were recorded by him subject to any marginal remarks made by him to comment on or emphasise any special point.

10. Reliance was placed by Mr. Gooptu on the decision of this Court in (1) *S.K. Mitra v. Commissioner of Presidency Division*, 80 CWN 697, wherein the compulsory retirement was justified even when no independent opinion was formed by the appointing authority who only accepted the recommendation of the review committee.

11. In (2) *A.C. Bose v. Union of India*, 1974 CLJ 8, the recommendation of the review committee has been set out in paragraph 10 of the report. The committee recommended as follows:— (1) an overall assessment of the confidential records of the following officers does not justify their continuance of service and, therefore, they should be retired in public interest". The Division Bench of this Court observed that the relevant minutes of the Review Committee's meeting of the 26th July, 1972, set out above, did not disclose the ground or material germane to the issue of compulsory retirement on the basis of which the appropriate authority formed the opinion that it was in public interest to make the order for compulsory retirement of the appellant.

12. In 1973 Memorandum 4 criteria have been laid down. Petitioner's case, however, does not fall in any of the criteria laid down in 1973 Memorandum Sub-clause (iii) of 1973 Memorandum lays down that if, on the result of a review it is considered that an officer who had done well in the lower grade is not adequate to the responsibility of the post held by him or will not be able to perform efficiently the duties of the post he is likely to hold for the next three years, it would be desirable to consider him for premature retirement under this rule.

13. The review committee did not consider the petitioner's case according to the above criteria. It is true that absence of any grounds or reasons does not invalidate the order of compulsory retirement. But at the same time either in the recommendation of the review committee or in the requisite opinion formed by the appointing authority there must be an indication that such recommendation or the opinion was formed on the basis of some materials germane to the issue that the Government servant shall retire compulsorily in the public interest.

14. In *S. K. Mitra's* case, 80 CWN. 697, the review committee recorded its opinion as follows:—

"As regards point no. (ii) it appears that there are successive reports that the integrity of the officer is doubtful. The officer would

- have been proceeded against departmentally had there been positive and concrete evidence against his integrity.

On the other hand, there are definite remarks that this officer works as a tout of the licensees and that his exit from the department will increase realisation of taxes.

This officer works in a revenue earning department and it seems that such an officer may not be kept in service at the cost of Government revenue when he can be retired under the service rules".

15. This Court observed that in view of the majority opinion of the Review Committee which was accepted by the respondent No. 1, there could not be any doubt that there were existence of grounds or materials germane to the issue at the time the impugned order was passed by the respondent no. 1. There was, therefore, no merit in the contention of the petitioner that the respondent no. 1 did not form any independent opinion on the question of retirement of the petitioner in the public interest but he acted as per the recommendation of the Review Committee.

16. In my view, the decision referred to by Mr. Gooptu has got no application to the facts and circumstances of the present case.

17. Mr. Gooptu took pains to place various Modern English Dictionaries for the purpose of construing the meaning of the word 'opinion'. It is urged by Mr. Gooptu that the opinion might be expressed by conduct. According to him, in the instant case, the conduct of the I. G. shows that he accepted the recommendation of the review committee. Accordingly, it was not necessary for him to form his independent opinion that the petitioner should retire in public interest.

18. The word "opinion" means one's view on a particular subject. It reveals a rational nexus between the fact considered and conclusion reached. It does not always lead to construction that process of forming opinion is altogether subjective and it is beyond even to a limited scrutiny by the Court that such an opinion was not formed on relevant facts or the opinion so formed has no rational nexus to the object. The appointing authority is required to form an opinion from certain facts and circumstances from which a reasonable man can come to a conclusion that the government servant should be retired in public interest. Opinion expressed by conduct does not enjoin the requirements of the Rules. The word "public interest" has a well defined meaning. The whole object of retiring a government servant prematurely is that, public money should not be wasted in mixing retaining those officers who outlived their utility to the service, whose integrities are doubtful, who are physically incapable of doing any work, who have lost efficiency and who are not mentally alert. These are some of the materials which are germane to the issue that a public servant should retire compulsorily in public interest. Each case, however, is to be considered on its own facts. There might

be some special and exceptional circumstances or reasons for forming an opinion that a public servant should retire compulsorily.

19. Where it appears from the minutes of the Review Committee that it considered about the physical fitness, mental alertness, integrity and efficiency of a particular officer referring to some of the adverse remarks recorded in the confidential file of that officer which are relevant to form an opinion that the said officer shall retire in the public interest, in that case the simple acceptance of the recommendation would be sufficient compliance with the rules. No independent opinion is required to be formed by the appointing authority inasmuch as the recommendation itself is clear, explicit and germane to the issue.

20. In my view, when an elaborate procedure has been laid down for rating a Government servant under Rule 75(aa), in that case procedure laid down in paragraph 29 of the Bengal Secretariate Manual by appending one's signature without noting anything, would not be in compliance with the requirements of the guidelines.

21. In (3) *Krishena Kumar v. S.P. Saksena & Ors.*, AIR 1973 SC 1365, the Supreme Court observed as follows :—

“The committee decided to review Appellants' case from the point of view of physical fitness, integrity and efficiency. After giving the various details the committee expressed the following opinion in para 6 of its report. Taking into account all the other facts the committee was of opinion that it would be neither in the public interest nor in the interest of its own personal longevity to retain Shri Krishena Kumar in service beyond the age of 55 years. It is clear from the affidavit of the Comptroller and Auditor General that he studied the recommendation of the committee and also considered the physical capacity, work and conduct of the appellant as revealed from his official records in order to form an opinion whether it was in public interest to retire the appellant after he had attained the age of 55 years. It was only after consideration of the entire material that he formed the opinion that it was in public interest to retire him. We are unable to see how in the presence of this material any argument can be raised that the appropriate authority did not form any opinion that the retirement of the appellant would be in public interest”.

22. In the instant case the materials placed before me do not indicate that the review committee did consider any relevant material and on the basis of such material recommended premature retirement of the petitioner. It is well settled that the court is entitled to examine the grounds or materials germane to the issue of compulsory retirement. In the absence of materials, there could not be any formation of opinion by the appointing authority that the petitioner should retire under Rule 75 (aa) of the West Bengal Service Rules, Part-I. Accordingly, the

impugned order is quashed. This Rule is made absolute. There will be no order for costs.

23. Let the operation of the order be stayed for four weeks, as prayed for.

N.C.S.

[CRIMINAL APPELLATE JURISDICTION]

Before Mr. Justice Nirmal Chandra Mukherjee

Decision ; January 13, 1978

Bhudev Mondal & Ors. Petitioners (Respondents)
Versus

Lakhindar Mondal (Appellant) Opposite party*

Restoration petition—Appeal allowed exparte—Order of acquittal made by Magistrate set aside by appellate order—Whether Sec. 362 of Cr. P. Code is a bar—Interference by court for ends of justice in appropriate cases.

This is an application for restoration of an appeal which has been allowed exparte on 31.8.77 and by an order of that date the order of acquittal made by the learned Magistrate was set aside and the opposite parties were convicted and sentenced.

The question is whether section 362 of the Code of Civil Procedure would operate as a bar. In other words, whether this court is competent to set aside the final order passed by it in appropriate cases.

HELD : In the present case an order of acquittal was set aside by this court and the learned Advocate for the petitioners could not be present at the hearing of the appeal to place the case of the petitioners for reasons stated in the petition. That being so, the petitioners should be given a chance to place their case. Therefore the exparte order made on 31.8.77 by which the appeal was allowed should be recalled,

Cases referred to :—

(1) *State of Bombay v. Nilkanth Shripad Bhawe*, AIR 1954 Bom 65

(2) *Ramballabh Jha v. State of Bihar*, AIR 1962 Pat 417

Hari Narayan Mukherjee for the Petitioners (Respondents)

J. Islam for the Opposite party (Appellant)

The judgment of the Court was as follows :—

This is an application for restoration of an appeal which was allowed exparte on the 31st August, 1977 and by the order of that date the order of acquittal passed by the learned Magistrate was set aside and the petitioners were convicted and sentenced. It is stated that the petitioners live in a remote village in the district of Birbhum and it was not possible for the petitioners to keep watch on the case pending in this court. The petitioners came to know that the above

*Criminal Appeal no. 300 of 1976.

appeal was allowed on the 31st of August, 1977 and the learned advocate Mr. Ujjal Kumar Sinha was not present in support of the petitioners' case. The Petitioners came to know of the above fact on the 10th of September, 1977. It was stated to the petitioners by the clerk to the learned advocate that the learned advocate missed the list on August 31st, 1977 and as such could not appear when the appeal was taken up for hearing. In the circumstances, it is prayed that as the order of acquittal has been set aside and the petitioners have been convicted and as the petitioners could not place their case for ends of justice the order passed on 31st August, 1977, be set aside and the appeal be restored to file and be heard in the presence of the petitioners. Mr. J. Islam, learned Advocate appearing on behalf of the opposite parties opposes the application. He contends that section 362 of the Code prevents the court from altering or reviewing the judgment of final order. Section 362 reads as follows :—"Save as otherwise provided by this Code or by any other law for the time being in force, no court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. That being so, it is submitted that the appeal was heard in presence of the learned advocate for the appellant. The learned advocate for the appellant placed the entire evidence on record. The Court considered the evidence and the facts and circumstances and was pleased to set aside the order of acquittal. In the circumstances, section 362 is a bar and this court cannot set aside the final order passed by it on the 31st August, 1977.

2. Mr. Harinarayan Mukherji, learned advocate appearing on behalf of the petitioners submits that in the exercise of inherent jurisdiction conferred on the court by section 482, this court for securing ends of justice can recall the order. In this case an order of acquittal was set aside by this court and the learned advocate for the petitioners could not be present to place the case of the petitioners for reasons stated in the petition. That being so, the petitioners should be given a chance to place their case. In support of the contention Mr. Mukherji relies on a full bench decision reported in (1) AIR 1954 Bombay 65 (*The State of Bombay v. Nilkanth Shripad Bhaye & anr.*). This was a case under the old Code. It has been held "As section 561A was enacted to emphasise the fact that the High Court has the widest jurisdiction to pass orders to secure the ends of justice, 561A must give power to the High Court to entertain applications which are not contemplated by Criminal P. C. Therefore, if the High Court feels that the ends of justice require that an order should be made in an application, although the application is not contemplated by the Code, the High Court will entertain the application and make the necessary orders to secure the ends of justice. "Mr. Mukherji submits that in the present case also the application for recalling the order may be entertained by the

court if the court feels that such an application should be allowed for ends of justice. Mr. Mukherji also relies on a decision reported in (2) AIR 162 Patna 417 (*Ramballabh Jha v. The State of Bihar*). In this case, a judgment in appeal was delivered without giving reasonable opportunity to the appellant or his pleader to be heard in the case as required by section 421 of the Code. It was held that the judgment was passed without jurisdiction and the High Court has inherent power to make an order for its being reheard. Relying on the proposition of law laid down in the cases referred to above and considering the facts and circumstances of the case, I am of opinion that the ex-parte order passed on the 31st of August, 1977 by which the appeal was allowed should be recalled.

3. In the result, the application succeeds. The order passed on 31st August, 1977 is recalled. Let the appeal be heard in presence of the parties.

P.R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Ganendra Narayan Roy

Decision : June 2, 1978

Renuka Dey Chowdhury & Ors. ... : ... Appellants

Versus

Dharam Chand Sarda & Ors. ... Respondents*

Bengal Agricultural Debtors Act (7 of 1936), Sec. 37 A—Decision of Debt Settlement Board relating to dispute—Whether Board has to give reasons for its decision—Conditions specified in sec. 37A (1) should be fulfilled in order to be a valid award.

Jurisdiction—Civil Court—Competency to decide question whether Tribunal had acted with jurisdiction and whether decision of Tribunal is according to provision of the Act.

The Tapan Debt Settlement Board in making the award has failed to act in accordance with the provisions of Section 37A of the Bengal Agricultural Debtors Act and an omnibus bald statement by Debt Settlement Board that the dispute was triable under section 37A of the Act was not sufficient to warrant that the Debt Settlement Board had really taken into consideration the question also whether the conditions specified in section 37A (1) were fulfilled or not. It is also to be noted that a judicial and/or quasi-judicial tribunal is, under an obligation to give reasons for its decision and in any event a bald statement that the dispute is triable under section 37A without giving any reason therefor can not be held to be compliance with the provisions of

*Appeal from Appellate Decree no. 963 of 1965.

the Act and/or proper discharge of judicial and/or quasi-judicial functions of a tribunal.

The Civil Court has jurisdiction to go into the question as to whether a particular tribunal had acted within the scope and ambit of its jurisdiction and whether it had determined certain facts in accordance with the provisions of the Act by determination of which it gets jurisdiction to adjudicate a dispute referred to the tribunal.

Cases referred to :—

- (1) *Jnanendra Narayan Singh v. Momena Khatoon*, 58 CWN 925
- (2) *Sm. Krishnamoni Das v. Baser Mondal*, AIR 1963 Calcutta 225 (FB)
- (3) *Malkarjun Bin Shidramappa v. Narahari Bin Shivappa*, 27 Indian Appeal 216
- (4) *Sk. Fakir Bakshi v. Muralidhar*, AIR 1931 Privy Council 63
- (5) *Turner Morrison & Co v. Monmohan Chowdhury*, 37 CWN 29
- (6) *Maharaja Suryakanta Acharya Bahadur v. Sarat Chandra Roy Chowdhury*, 20 CLJ 563

Mrinal Kanti Ghosh Chowdhury and Mohanlal Dey ...for the Appellants
Sudhis Dasgupta and Pradipta Roy for the Respondents.

The judgment of the court was as follows :—

This appeal arises at the instance of the defendants out of the judgment and decree passed by Additional Subordinate Judge, Balurghat in O.C. Appeal No. 33 of 1962 affirming the judgment and decree passed by the learned Munsif, Balurghat in O.C. Suit No. 178 of 1960.

2. The plaintiffs respondents instituted the said O.C. Suit No. 178 of 1960 for a declaration that the award made by the Debt Settlement Board at Tapan in Case No. 54/6 of 1943 under section 37A of the Bengal Agricultural Debtors Act was void and inoperative. There was further prayer for declaration of plaintiffs' title to the suit properties and for recovery of possession thereof if it was found by the Court that symbolie possession had been taken by the defendants and such symbolic possession had amounted to dispossession of the plaintiffs. There was also prayer for permanent injunction restraining the defendants from realising rents from the tenants to the extent of 10 annas 8 pias share.

The facts of the case may be stated in short as follows :—

3. The putni rents in respect of touzi No. 894 of Dinajpur Collectorate fell in arrears as a result of which there was a Rent Suit, being Rent Suit No. 1 of 1938 of the Court of the learned Subordinate Judge, Dinajpur. The said suit was decreed and the decree was put into execution in Rent Execution case No. 111 of 1936. The properties in question were auction purchased by the decree-holder on 9-2-1937 and delivery of possession thereof was also obtained by the said decree-holder through Court. The Touzi was thereafter sold at a Revenue sale in Case No. 16/19 of 1938-39

and was auction purchased by Meghraj Sarda at a Revenue sale which took effect on June 29, 1938. Thereafter Meghraj sold the properties to the plaintiffs by registered kobala dated 21st July, 1939 and the plaintiffs came in possession thereof. Sometime thereafter the defendants applied to the Debt Settlement Board, Tapan under section 37A of the Bengal Agricultural Debtors Act in Case No. 54/6 of 1943 of that court. The said Board gave an award and on the basis of the said award the sale held in the aforesaid Rent Execution Case was set aside by the Court of the Subordinate Judge, Dinajpur. The defendants thereupon obtained possession of 8 annas 8 pies which was of the putni interest in respect of the touzi in question through Court on 21st January, 1950. The plaintiffs contended that the said award by the Tapan Debt Settlement Board was void and inoperative and as aforesaid the said suit was instituted for the aforesaid declaration and for permanent injunction.

4. The said suit was contested by the defendants by filing joint written statement, *inter alia*, denying the material averments in the plaint. It was contended *inter alia* by the defendants that the award in question by Tapan Debt Settlement Board was not invalid and that the auction purchaser in the Rent Execution case in question and Meghraj Sarda, the auction purchaser at the Revenue Sale in question were only the benam-dars of the plaintiffs. It was also alleged that the suit is barred by resjudicata and limitation and that the Court had no jurisdiction to declare the award in question as void and inoperative.

5. It may be stated in this connection that the suit was originally heard by the learned Subordinate Judge and the said suit was dismissed on the finding that the Civil Court had no jurisdiction to set aside the award passed by the Debt Settlement Board and against the said judgment and decree of the learned Subordinate Judge, an appeal was preferred before the learned District Judge and on appeal the judgment and decree passed by the trial court was set aside and the suit was sent back for disposal on merits. Subsequently the pecuniary jurisdiction of the learned Munsif was raised and accordingly the suit was transferred in the Court of the learned Munsif for disposal and the said suit was decreed by the learned Munsif on the finding that the putni and darputni interests in question had merged in the superior zamindari interest and as such there was no separate existence of putni and darputni in question at the relevant time when the sale took place, as a result of which, there was no question of annulment of encumbrance under section 37 of the Revenue Sales Act. Against the said judgment and decree, an appeal, being O.C. Appeal No. 33 of 1962 of the Court of the Additional Subordinate Judge, West Dinajpur at Balurghat was preferred. It is to be noted in this connection that along with O.C. Appeal No. 33 of 1962, Rent Appeal No. 13 of 1955 arising out of Rent Suit No. 614 of 1954 was also taken up

for hearing. The Rent Suit No. 614 of 1954 was brought by the defendants against the sub-tenants after they had obtained symbolical possession through Court in execution of the award of the Debt Settlement Board. The learned Subordinate Judge came to the finding that the award in question was void and the order of delivery of possession in favour of the defendants was also not quite proper and as such the defendants did not acquire any interest in the property by virtue of the award passed by the Debt Settlement Board. Consequently it was held by the Subordinate Judge that the defendants were not competent to sue the sub-tenants for arrears of rent and the decree passed in Rent Suit No. 614 of 1954 in favour of the defendants was not maintainable in law and should be set aside without entering into the merits. On such finding, the learned Subordinate Judge dismissed the said O.C. Appeal No. 33 of 1962 and allowed the Rent Appeal No. 13 of 1955. The instant appeal before this Court was preferred by the defendants against the judgment and decree passed in the said O.C. Appeal No. 33 of 1962 affirming the judgment and decree passed in O.C. Suit No. 38 of 1960.

6. Mr. Ghosh Chowdhury, the learned Counsel appearing for the appellants contended that the Civil Court had no jurisdiction to enter into the question of validity or legality of the award of the Debt Settlement Board in question. It was contended by Mr. Ghosh Chowdhury that the Debt Settlement Board being a Tribunal constituted under the Bengal Agricultural Debtors Act, within the scope and ambit of its jurisdiction had made a finding both in respect of the merits of the proceeding before it and also in respect of the maintainability of the Debt Settlement proceeding and on such finding both in respect of the merits and also in respect of the maintainability of the proceeding, passed the impugned award. The plaintiffs not having availed of the provisions of appeal and revision under sections 40 and 40A of the Bengal Agricultural Debtors Act, the finding made by the Debt Settlement Board became final and the tribunal having acted within the scope and ambit of its special jurisdiction, the Civil Court had no authority to go into the question of correctness and validity of the said award. Mr. Ghosh Chowdhury also contended that there was no inherent lack of jurisdiction in the instant case so far as the Tapan Debt Settlement Board is concerned. There was also no erroneous assumption of jurisdiction by the said Debt Settlement Board. Even assuming that an erroneous finding was made by the Debt Settlement Board on wrong appreciation of the facts of the case, such erroneous finding could have been rectified by taking recourse to appellate and/or revisional provisions of the Act as stated hereinbefore and such action not having been taken, the error in fact, if any, though lamentable, cannot be rectified by the Civil Court. Mr. Ghosh Chowdhury for this proposition referred to a number of decisions

viz. the decision made in the case of (1) *Jnanendra Narayan Singh v. Momena Khatoon*, reported in 58 CWN 925, the decision made in the case of (2) *Sm. Krishnamoni Dasi v. Baser Mondal*, reported in AIR 1963 Calcutta, page 225 (FB) and the decision made in the case of (3) *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa*, reported in 27 Indian Appeal 216. Mr. Ghosh Chowdhury next contented that there was no merger of putni or darputni interest with the zamindary interest. It was contended that the zamindary interest of 1 anna 3 gandas 1 kada 1 kranti did not merge with the putni interest. It was contended by him that under the law of merger the entire lesser interest must merge with the greater interest or in other words, there shall be no existence of lesser interest after merger. Reference to section 111(d) of the Transfer of Property Act was made in this connection by Mr. Ghosh Chowdhury. He also referred to the decision made in the case of (4) *Sk. Fakir Bakshi v. Muralidhar*, reported in AIR 1931 Privy Council page 63 for this proposition. Mr. Ghosh Chowdhury also contended that unlike Bengal Tenancy Act, under the provisions of section 37 of the Bengal Revenue Sales Act, even after revenue sale an undertenure subsists unless such undertenure is annulled and reference was made by Mr. Ghosh Chowdhury for this proposition to the decision made in the case of (5) *Turner Morrison & Co. v. Monmohan Chowdhury*, reported in 37 CWN. page 29. Mr. Ghosh Chowdhury contended that in the facts and circumstances of the case, there could not be any merger in law and the undertenure interest in question also subsisted. Accordingly the provisions of section 37A of the Bengal Agricultural Debtors Act were applicable in the facts and circumstances of the case. Mr. Ghosh Chowdhury further contended that the record of rights had no foundation and in any event, the record of rights does not establish any title to the property in question but the record of rights is only a proof of title by possession. Mr. Ghosh Chowdhury contended that it would appear from the award of the Tapan Debt Settlement Board that the Board came to the finding that on the basis of the papers produced by the debtor, it transpired that the dispute was triable under section 37A of the Bengal Agricultural Debtors Act. Mr. Ghosh Chowdhury contended that although elaborate reasonings were not given for the said finding but as the said Debt Settlement Board came to the finding that section 37A of the Bengal Agricultural Debtors Act was applicable in the facts of the case, it would but be held that the Board had also decided about the maintainability of the proceeding.

7. Mr. Dasgupta the learned Council appearing for the respondents however, contended that as Meghraj Sarda purchased the touzi at revenue sale, he held the interest of the Crown subject to the payment of revenue but he did not held the interest of a tenant or the interest of the decree-holder. For this proposition, Mr. Dasgupta referred to a

decision of this Court made in the case of (6) *Maharaja Surya Kanta Acharya Bahadur v. Sarat Chandra Roy Chowdhury*, reported in 20 CLJ., page 563. Mr. Dasgupta further contended that in the special facts and circumstances of the case it should be noted that Ibrahim Chowdhury held 14 annas 6 gaddas 2 karas 2 krantis share of zamindary interest and the balance of interest was held by Rajani, Madhuri, Narayan and others. It was only Ibrahim who gave putni interest to Rajani, Madhuri and Ramendra and such putni interest was sold to the plaintiffs. Thereafter Ibrahim Chowdhury filed Rent Suit No. 1 of 1933 of the Court of the Subordinate Judge, West Dinajpur against putnidars and obtained a decree. The said Ibrahim Chowdhury thereafter sold his maliki right and also the interest obtained by the decree to one Ram Kishan Rador. The said Ram Kishan filed Rent Execution Case No. 111 of 1936 and as purchaser in auction the putni and darputni interest, Ram Kishan also took delivery of possession of such interest through Court. Thereafter, the entire touzi was put to revenue sale for default of payment of revenue and on 24th September, 1938 Meghraj Sarda purchased the touzi at revenue sale and in December 19, 1938, Meghraj Sarda took delivery of possession through Court. The plaintiffs purchased their interest from Meghraj Sarda vide Ext. 1. Rajani and others thereafter filed applications under section 37A of the Bengal Agricultural Debtors Act for setting aside the rent sale to the extent of 10 annas and old shares. Mr. Dasgupta contended that the relevant date under section 37A of the Bengal Agricultural Debtors Act was December 20, 1939. Accordingly in the facts as stated hereinbefore, it is quite clear that prior to such relevant date the entire putni and darputni interests which were granted by Ibrahim Chowdhury merged with the Zamindary interest and as such it cannot be contended that there was no merger. Mr. Dasgupta further contended that in the aforesaid facts and circumstances of the case it is also quite evident that on the date of the application under section 37A of the Bengal Agricultural Debtors Act the applicants i.e. Rajani and ors. had no subsisting interest which, as a matter of fact, had merged and by virtue of the purchase at a revenue sale, Meghraj Sarda obtained a valid title to the property and he also obtained possession through Court. Accordingly, Mr. Dasgupta contended that the proceeding under section 37A of the Bengal Agricultural Debtors Act was not maintainable.

• 8. Mr. Dasgupta contended that under the provisions of subsection (2) of Section 37A of the Bengal Agricultural Debtors Act, the Debt Settlement Board was under an obligation to determine as to whether conditions specified under section 37A(1) are fulfilled or not. Mr. Dasgupta contended that this is a mandatory provision and the Board is bound to determine it explicitly and in clear term. Mr. Dasgupta contended that a mere omnibus and bald statement that the dispute was triable under section 37A by the Debt Settlement Board cannot

be held as compliance of provisions of section 37A(2). Mr. Dasgupta contended that if the tribunal fails to act in accordance with the provisions of the Act by which the tribunal gets jurisdiction and power, it is always open to the Civil Court to look into the question as to whether the tribunal had acted within its power or whether the tribunal had overstepped its limits. Mr. Dasgupta contended that in the instant case, the Debt Settlement Board failed to determine the conditions specified in section 37A(1) as required to be done under section 37A(2). The tribunal had therefore clearly acted illegally and without jurisdiction and as such the award of the tribunal can be lawfully questioned by the Civil Court and the Civil Court was also quite competent to hold that the finding of the tribunal was illegal and without jurisdiction. Mr. Dasgupta also referred to the Full Bench decision made in the case of *Sm. Krishnamoni Dasi* (Supra) and referred to the decision of Laik J. It was held by Laik J. in the said decision that it is for the Courts of general civil jurisdiction to determine what is the scope or the authority given to a statutory tribunal and to investigate the question as to whether a special or subordinate tribunal has acted within the limits of its jurisdiction. Even where jurisdiction is given to the statutory tribunal to determine certain facts so as to give itself jurisdiction, it will be for the Court of general jurisdiction to adjudicate as to what are the powers which the statute has given to such an authority or tribunal. Mr. Dasgupta contended that in the aforesaid facts and circumstances, it was quite clear that the conditions specified in section 37A(1) were not fulfilled and the Debt Settlement Board though under an obligation to make a positive finding in that regard failed to do so and as such the award of the Board was illegal and without jurisdiction and the Civil Court rightly decided that the award of the Debt Settlement Board was void. Mr. Dasgupta contended that the question of taking appeal or revision under section 40 or 40A did not arise in the present facts and circumstances of the case inasmuch as it is not the case of the plaintiff that the tribunal had acted within the scope and ambit of its jurisdiction but while acting within such scope and ambit of its jurisdiction, it had made some erroneous findings. Mr. Dasgupta contended that without determining as to whether the conditions specified in section 37A(1) were fulfilled or not, the tribunal had no authority to proceed in the matter and the tribunal having proceeded without such determination the adjudication of the tribunal must fail on the face of it. Mr. Dasgupta also contended that as a matter of fact the conditions specified in section 37A(1) were also not fulfilled and as such the tribunal could not assume any jurisdiction in the matter. Mr. Dasgupta further contended that the putni or darputni interest in its entirety had merged because such putni and darputni interests were created only by Ibrahim Chowdhury to the extent of his share in the zamindary interest.

9. In my view, the contention made by Mr. Dasgupta are of substance and I am inclined to accept the same, I am of the view that Tapan Debt Settlement Board failed to act in accordance with the provisions of section 37A of the Act and the omnibus bald statement by the Debt Settlement Board that the dispute was triable under section 37A of the Act was not sufficient to warrant that the Debt Settlement Board had really taken into consideration the question as to whether the conditions specified in section 37A (1) were fulfilled or not. It is also to be noted that a judicial and/or quasi-judicial as tribunal is under an obligation to give reasons for its decision and in any event a bald statement that the dispute is triable under section 37A without giving any reason therefor cannot be held to be compliance with the provisions of the Act and/or proper discharge of judicial and/or quasi judicial functions of a tribunal. I am also of the view that the Civil Court has jurisdiction to go into the question as to whether a particular tribunal had acted within the scope and ambit of its jurisdiction and whether it had determined certain facts in accordance with the provisions of the Act by determination of which it gets jurisdiction to adjudicate a dispute referred to the tribunal. Accordingly, the appeal fails and the judgment and decree of the Court of Appeal below is affirmed but in the facts and circumstances of the case, I make no order as to costs.

S. P. M.

[SPECIAL JURISDICTION (INCOME TAX)

Before Mr. Justice Samarendra Chandra Deb and Mr. Justice

Sudhindra Mohan Guha

Decision : April 21, 1978

M/s. East India Pharmaceutical Works Ltd., Calcutta ... Applicant
Versus

Commissioner of Income Tax, West Bengal-V, Calcutta...Respondent*

Interest on money borrowed for payment of income tax—Whether allowable as business expenditure—Section 37(1), Section 40(a) (ii), Section 80 V of the Income Tax Act, 1961.

The assessee had an overdraft account with a bank and utilised this account for payment of income tax and claimed the proportionate interest paid on the said amount as an allowable expenditure under Section 37(1) of the Income Tax Act, 1961. The Income Tax Officer disallowed the claim. The appeals filed by the assessee were dismissed by both the Appellate Authorities by following the case of Mannalal Ratanlal v. Commissioner of Income Tax, 58 ITR 182.

On a reference at the instant of the assessee :—

**I-Tax Reference No. 404 of 1975.*

HELD: (a) The expenditure incurred or laid out for the purpose of payment of income tax cannot fall within the scope of the expression "for the purpose of business". In view of Section 40(a)(ii), no commercial principle, whatsoever can make the income tax levied on the profits or gains of any business, a deductible expenditure under Section 37(1) of the Act.

(b) Section 80-V applied to all assesseees alike. It is not confined to any particular source of income nor it is based on any commercial principle or commercial expediency.

(c) Payment of income tax or the interest paid on the borrowed money for the payment of income tax is not at all related with the purpose and the object of the business. And no element of trade in its commercial sense being involved in it, the commercial principles and the commercial expediency must be left out of consideration in determining this issue.

Cases referred to :—

- (1) *Mannalal Ratanlal v. Commissioner of Income Tax*, 58 ITR 182.
- (2) *Commissioner of Income Tax, Bombay North v. Chandulal Keshavlal & Co.*, 38 ITR 601
- (3) *Commissioner of Income Tax, Kerala v. Malayalam Plantations Ltd.* 53 ITR 140
- (4) *Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth Tax (Central)*, Cal. 59 ITR 767
- (5) *Travancore-Titanium Product Ltd. v. Commissioner of Income Tax, Kerala*, 60 ITR 277
- (6) *Shree Minakshi Mills Ltd. v. Commissioner of Income Tax*, Mad. 63 ITR 207
- (7) *Commissioner of Income Tax, West Bengal v. Birla Cotton Spg. & Wvg. Mills Ltd.*, 82 ITR 166
- (8) *Indian Aluminium Co. Ltd. v. Commissioner of Income Tax*, W. B., 84 ITR 735
- (9) *Aruna Mills Ltd. v. Commissioner of Income Tax*, Ahmedabad 31 ITR 153
- (10) *Maharajadhiraj Str Kameswar Singh v. Commissioner of Income Tax*, Patna, 42 ITR 774
- (11) *Commissioner of Income Tax, Gujarat v. Mrs. Indumati Ratanlal* 70 ITR 353
- (12) *Commissioner of Income Tax v. Oriental Carpet Manufacturers (India) Pvt. Ltd.* 90 ITR 373
- (13) *Dalmia Dadri Cement Ltd. v. Commissioner of Income Tax*, 86 ITR 577
- (14) *Madhav Pd. Jatia v. Commissioner of Income Tax*, U.P. 87 ITR 298
- (15) *Commissioner of Income Tax v. Calcutta Landing & Shipping Co. Ltd.* 77 ITR 575

(16) *Waldies Ltd. v. Commissioner of Income Tax, West Bengal-III*, 110 ITR 577

(17) *Dalmia Dadri Cement Ltd v. Commissioner of Income Tax, Delhi (Central)*, 90 ITR 297

(18) *Ashton Gas Co. v. Attorney General*, 1906 AC 10

(19) *State of Orissa v Sudhansu Sekhar Misra*, AIR 1968 SC 647

(20) '*Privy Purse Case*' AIR 1971 SC 530

Kalyan Ray and Manas Banerjee ... for the Applicant
Ajit Sengupta and Prabir Majumdar ... for the Respondent

The judgment of the court was as follows :—

Deb, J. : This is a Reference under section 256(1) of the Income-tax Act 1961. The assessment year is 1972-73. The previous year ends on December 31, 1971. The question before us runs thus :

“Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the payment of interest of Rs. 28, 488/- on money borrowed for payment of income-tax was not an expenditure laid out wholly and exclusively for the purpose of business as contemplated by sub-section (1) of section 37 of the Income-tax Act, 1961 ?”

The assessee is a company. The company had an overdraft account with a bank and utilised this account for payment of income-tax and claimed the proportionate interest paid on the said amount as an allowable expenditure under section 37(1) of the Income-tax Act, 1961 (hereinafter referred to as the Act).

2. The Income-tax Officer disallowed the claim. The appeals filed by the assessee were dismissed by both the Appellate Authorities by following the case of (1) *Mannalal Ratanlal v. Commissioner of Income-tax*, 58 ITR 182.

3. S.P. Mitra, J., (as he then was) speaking for this Court in the aforesaid case, held that the interest paid on a borrowed amount for payment of income-tax is not a deductible expenditure under Section 10(2) (xv) of the Indian Income-tax Act, 1922.

4. Mr. Kalyan Ray, learned counsel for the assessee, argues before us that the aforesaid case was wrongly decided by this Court in view of the following decisions of the Supreme Court :

(2) *Commissioner of Income-tax, Bombay North v. Chandulal Keshavlal & Co.*, 38 ITR 601 ; (3) *Commissioner of Income-tax, Kerala v. Malayalam Plantations Ltd.*, 53 ITR 140 ; (4) *Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth-tax (Central)*, Calcutta, 59 ITR 767 ; (5) *Travancore Titanium Product Ltd v. Commissioner of Income-tax, Kerala*, 60 ITR 277 ; (6) *Shree Minakshi Mills Ltd. v. Commissioner of Income-tax, Madras*, 63 ITR 207 ; (7) *Commissioner of Income-tax, West Bengal v. Birla Cotton Spinning & Weaving Mills Ltd*, 82 ITR 166 ; and

(8) *Indian Aluminium Co. Ltd. v. Commissioner of Income-tax, West Bengal* 84 ITR 735.

5. In the case of (4) *Kesoram Industries & Cotton Mills Ltd.*, (supra), the assessee was a company and therefore Mr. Ray argues that in this case the Supreme Court has held that "the income-tax liability of a company is a trading debt". But we reject it as the Supreme Court has not said so and we must not misread it, as rightly said by Mr. Ajit Sengupta, learned counsel for the Revenue.

6 Now, in (3) *Malayalam Plantations Ltd.* (supra), at page 150 of the Report, the Supreme Court says this :

"The expression 'for the purpose of the business' is wider in scope than the expression, for the purpose of earning profits'. Its range is wide ; it may take in not only the day to day running of a business but also the rationalisation of its administration and modernisation of its machinery ; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive, process or assertion of hostile title ; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business ; it may comprehend many other acts incidental to the carrying on of its business."

7. Mr. Ray picks up the words "it may also comprehend payment of statutory dues and taxes" and argues that the expression "for the purpose of the business" is wide enough to include payment of income-tax, but we reject it, for the payment of income-tax is not a pre-condition either for commencing or for carrying on of a business.

8. Mr. Ray then cites the cases of (2) *Chandulal Keshavlal*, (supra), (5) *Travancore Titanium Product Ltd.*, (supra), and (8) *Indian Alumium Co. Ltd.*, (supra), and argues that on the ground of commercial expediency, trading principles and commercial practice it should be held that the interest paid by the assessee on the borrowed money for the payment of income-tax is an expenditure incidental to the business of the assessee and as such it is a deductible expenditure under section 37(1) of the Act. He also places strong reliance on the case of (7) *Birla Cotton Spinning And Weaving Mills Ltd.*, (supra) at p. 172 of the Report, where the Supreme Court says this :

"It must be remembered that the earning of profits and the payment of taxes are not isolated and independent activities of a business. These activities are continuous and take place from year to year during the whole period for which the business continues."

He argues that the payment of income-tax is a business activity of a trader and that even if an expenditure is not directly related to the earning of income it may still be regarded as an admissible deduction as observed by the Supreme Court in the case of *Meenakshi Mills Ltd.*, (supra), at p. 213 of the Report.

9. Now, in the case of (7) *Birla Cotton Spinning And Weaving Mills Ltd.*, (supra), assessments for certain assessment years had already become final and investigation proceedings were started against the assessee regarding those assessment years. If the result of the said investigations went against the assessee its business would have been totally annihilated in as much the assessee would have been liable to pay a huge tax for those assessment years. In those circumstances, the assessee had to incur law charges and expenses to fight out the said investigation and claimed those amounts as deductible expenditure. The Supreme Court held that those amounts were deductible expenditure because the assessee had to incur those expenditure for the purpose of protection and preservation of its business.

10. Mr. Ray also fails to notice that the Supreme Court has used the expression "the earning of profits" and not the expression "for the purpose of business" in its aforesaid dictum which was made on a different context and has no bearing on the question in this Reference before us. Similarly, the aforesaid decisions of the Supreme Court cited by him were decided on different facts and they do not apply to the case in hand.

11. It is a settled law that the expression "for the purpose of a business" is wider in scope than the expression "for the purpose of earning profit". It is also a settled law that an expenditure cannot be allowed as a business expenditure under Section 37(1) of the Act unless it was incurred or laid out directly or indirectly by an assessee wholly and exclusively for the purpose of his business.

12. A trader carries on the business for the purposes of earning profits and not for the purposes of paying the income-tax. No business is ever carried on, nor can it be carried on with the object of paying the income-tax. Though "the earning of profits and the payment of taxes are not isolated and independent activities of a business", it cannot be said that the expenditure incurred or laid out for the purpose of the payment of income-tax should fall within the scope of the expression "for the purpose of the business".

13. In (9) *Aruna Mills Ltd. v. Commissioner of Income-tax, Ahmedabad*, 31 ITR 153, the Bombay High Court has rejected the claim for deduction of interest paid under Section 18A(7) of the Indian Income-tax Act, 1922 with an observation that it "is difficult to understand how, when a businessman commits default in discharging his statutory obligation, the consequence of that default could constitute an expenditure exclusively made for the purpose of his business."

14. Mr. Ray disputes the correctness of the aforesaid observation and argues that the payment of income-tax should be held to be business expenditure on commercial principles or on the ground of commercial

expediency. In support of this contention he places reliance on clause 3 of item (vi) of Schedule VI of the Companies Act, 1956 and argues that the amount of income-tax payable by a company must be debited to the profit and loss account and therefore in determining the trading profits of a company the amount of income-tax is a proper charge. But there is no merits in his contention in view of item (h) of clause (x) of the aforesaid Schedule which specifically provides that the taxes on income cannot be included in the profit and loss account.

15. In (10) *Maharajadhiraj Sir Kameswar Singh v. Commissioner of Income-tax, Patna*, 42 ITR 774, Ramaswami C.J., at page 778 speaking for the Patna High Court says that "a deduction of interest on money borrowed for payment of tax is not a legitimate deduction". At page 779 of the Report his lordship further says: "nor can the interest payable by the assessee be claimed as business expenditure under section 10(2) (xv) of the Indian Income-tax Act, 1922".

16. This Court in the case of (1) *Mannalal Ratanlal*, (supra) has followed the aforesaid decision of the Patna High Court. The case of *Mannalal Ratanlal* (supra), has been followed by the Gujrat High Court in the case of (11) *Commissioner of Income-tax, Gujarat v. Mrs. Indumati Ratanlal* 70 ITR 353, by the Punjab High Court in case of (13) *Dalmia Dadri Cement Ltd v. Commissioner of Income-tax*, 86 ITR 577, by the Allahabad High Court in the case of (14) *Madhav Pd. Jatia v. Commissioner of Income-tax*, U.P. 87 ITR 298, and again by the Punjab High Court in the case of (12) *Commissioner of Income-tax v. Oriental Carpet Manufacturers (India) Pvt.* 90 ITR 373.

17. In case of *Birla Cotton Spinning and Weaving Mills Ltd.*, (supra), the Supreme Court has approved the decision of this Court in the case of (15) *Commissioner of Income-tax v. Calcutta Landing & Shipping Co. Ltd.*, 77 ITR 575, in which this Court did not differ from *Mannalal Ratanlal* case, (Supra), and only distinguished it on facts.

18. In the case of (16) *Waldies Ltd. v. Commissioner of Income tax, West Bengal III*, reported in 110 ITR 577, this Court followed the case of *Mannalal Ratanlal*, (supra), by rejecting the same arguments made before us by Mr. Ray.

19. In (17) *Dalmia Dadri Cement Ltd v. Commissioner of Income-tax Delhi (Central)*, 90 ITR 297, it was argued that the earlier case of (13) *Dalmia Dadri Cement Ltd. v. Commissioner of Income-tax*, (supra), was wrongly decided in view of the judgment of the Supreme Court in the case of *Birla Cotton Spinning and Weaving Mills Ltd.*, (supra), and Mr. Ray repeats the same arguments but the Punjab and Haryana High Court rejected those arguments. And we respectfully agree with the reasons given by their lordships in rejecting those arguments.

20. Further, section 40(a) (ii) of the Act provides that notwithstanding anything to the contrary in section 30 to 39, in computing the

income chargeable under the head "profits and gains of business or profession" any sum paid on account of tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains shall not be deducted. Therefore no commercial principal whatsoever can make it a deductible expenditure under section 37(1) of the Act in view of the aforesaid mandate of the law.

21. Further, the provisions of section 80V, introduced with effect from April 1, 1976 by section 26 of the Taxation Laws (Amendment) Act, 1975, cannot be ignored in deciding the instant question before us. It provides that any interest paid by an assessee in the previous year on any money borrowed for the payment of tax due from him under the Act shall be deducted in computing his total income.

22. Section 80V applies to all assesseees alike. It is also not confined to any particular source of income, nor it is based on any commercial principle or commercial expediency.

23. Hence to accept the argument of Mr. Ray that the interest paid on money borrowed for the payment of income-tax is a deductible expenditure under section 37(1) of the Act is to hold that with effect from April 1, 1976 an assessee whose income is taxable under section 28 of the Act is entitled to a double deduction for the same amount namely in the computation of his business or professional income and again in the computation of his total income and accordingly his contention must fail, for we are unable to impute such a lack of wisdom in the legislature.

24. However wide may be the term "commercial expediency", an expenditure cannot be allowed as a business expenditure under section 37(1) of the Act unless it is directly or indirectly incurred or laid out wholly and exclusively for the purpose of the business that is to say for the purpose of carrying on or carrying out of the business. And it is futile to argue that each and every expenditure incurred by a trader is a deductible expenditure.

25. Now in (18) *Ashton Gas Co. v. Attorney General*, 1906 AC 10 at page 12 of the Report, Lord Chancellor says this ;

"The income-tax is a charge upon the profits ; the thing which is taxed is the profit that is made and you must ascertain what is the profit that is made before you deduct the tax—you have no right to deduct the income-tax before you ascertain what is the profit. I cannot understand how you can make the income-tax part of the expenditure.

26. Since the amount paid as income-tax is not an expenditure at all, not even a business expenditure, it cannot even be argued that the interest paid by a trader on the money borrowed for the payment of income-tax is a business expenditure on any commercial principle, not

even on the ground of commercial expediency. Further, the payment of income-tax or the interest paid on the borrowed money for the payment of income-tax is not at all related with the purpose and the object of the business. And no element of trade in its commercial sense being involved in it, the commercial principles and the commercial expediency must be left out of consideration in determining this issue.

27. Mr. Ray in desperation has picked up a line or two from one or the other judgment of the Supreme Court dehors their context as *Mannalal Ratanlal* case, (supra), stares at his face, but in the (20) "Privy Purse case", AIR 1971 SC 530, at p. 578 of the Report, Shah J. (as his lordship then was) says this :

"It is difficult to regard a word, a clause or a sentence occurring in a judgment of this court, divorced from its context as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment".

28. As already said, the instant question before us "did not even fall to be answered in" those judgments of the Supreme Court cited by Mr. Ray and those observations have no bearing on it. Further, a "decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein, nor what logically follows for the various observations made in it", as said by Hedge, J. while speaking for the Supreme Court in the case of (19) *State of Orissa v. Sudhansu Sekhar Misra*, AIR 1968 SC 647, at page 651 of the Report.

29. For all the aforesaid reasons we reject the arguments of Mr. Ray and answer the question in the affirmative and in favour of the Revenue without making any order as to costs.

Guha, J. : I agree.

A. S. G.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Pradyot Kumar Banerjee and Mr. Justice •

Bimalendra Nath Maitra

Decision : May 12, 1978

State of Assam & Anr. ... Appellants

Versus

Stresscon Engineering Co. (P) Ltd. ... Respondent*

Arbitration Act (X of 1940), Sec. 20—Application under—Cause of action partly arising within territorial jurisdiction of Alipore Court—Whether Alipore Court has jurisdiction to entertain and dispose of instant application under sec. 20—Whether notice under sec. 80 C.P.C. is necessary for initiating such proceeding—Whether there is absence of mutuality in clause 25 of

*Appeal from Original Decrees nos. 455 of 1976 and 30 of 1977.

Agreement—Award, whether binding on both the parties—Award of costs in such proceeding.

These appeals arise out of an application under section 20 of the Arbitration Act, 1940.

It is contended that the court of the subordinate Judge at Alipore has no jurisdiction to entertain and dispose of the application under section 20 of the Act filed by the respondent inasmuch as the court at Shillong is the appropriate court and not the Alipore Court.

HELD : The contention is not tenable. In the facts of the present case it appears that a part of the cause of action arose within the jurisdiction of the Alipore Court which disposed of the said application under section 20 of the Act. That being so, a part of the cause of action upon which the arbitration agreement relates arose within the jurisdiction of the Alipore Court and as such Alipore Court has also the jurisdiction to deal with such the matter.

The next contention of the appellants is that it is necessary that a notice under section 80 of the Civil Procedure Code has to be served upon the appropriate authority for the purpose of initiating the instant proceeding under section 20 of the Arbitration Act.

HELD : For the purpose of commencing a proceeding under section 20 of the Arbitration Act, no notice under section 80 of the Code is at all necessary.

The third contention of the appellants is that there is no mutuality in the arbitration agreement in clause 25 of the Tender (contract) inasmuch as, the contractor, one of the parties, can alone refer any dispute under the agreement to the arbitrator and that the same is binding only on the contractor and not on the other party.

HELD : Clause 25 of the Tender makes it quite clear that there is mutuality in the contract and in the instant case, both the parties to the contract, in fact, referred the disputes for the arbitration to the Chief Engineer. Clause 25 is the arbitration clause which should be read with clause 23 of the Agreement. The cardinal purpose of an arbitration is to resolve the disputes between the parties to the Agreement. Where the decision of a person is binding only on one of the parties and not on all the parties to the disputes, it cannot be said that the functions which the person giving the decision is discharging is arbitral in character. Reading clause 25 with clause 23, it appears that the decision should be final, conclusive and binding on all the parties to the contract. In other words, clauses 23 and 25 of the Agreement empower both the parties to refer matters in dispute to the arbitrator and the Arbitrator's award would be binding on both the parties.

If the arbitrator named in the Agreement fails to act or cannot act, the court has the power to fill up that vacancy.

Clauses 23 and 25 read together provide that each party has agreed to

refer the disputes to the arbitration and the award of the arbitrators or of the referee is binding on both the parties to the Agreement.

The court below committed an error in awarding costs in this matter.

Cases referred to :—

- (1) *Hakam Singh v. Gammon (India) Ltd*, AIR 1971 SC 740
- (2) *Firm Ramchand & Sons v. Governor General*, AIR 1947 Sind 147
- (3) *Gian Singh v. Atma Ram*, AIR 1933 Lahore 374
- (4) *S. P. C. Engineering Co. v. Union of India*, AIR 1966 Cal. 259
- (5) *Secretary of State v. Kundan Singh*, AIR 1932 Lahore 374
- (6) *State of U. P. v. Pudam Singh*, AIR 1971 All 270
- (7) *Baron v. Sunderland Corporation*, 1966 (1) All E.R. 349

Ananga Kumar Dhar and Ranjit Kumar Ray Chowdhury...for the Appellants
Dipankar Gupta, Pradip Chowdhury and Tapan Kumar Mukherjee
.. for the Respondent

The judgment of the Court was as follows :—

Banerjee, J. : This appeal at the instance of the State of Assam arises out of an application under section 20 of the Arbitration Act. The relevant facts for our purpose are that the respondent company submitted a tender in respect of public notification inviting tenders for design and construction or re-construction of five bridges, namely, 7/1, 21/2, 22/2, 28/1 and 32/2 on North Trunk Road in the State of Assam under North Trunk Road Division and Mangaldoi Road Division of P.W.D., Assam. It is alleged that the said tender was accepted by the competent authority and the contract was entered into by and between the plaintiff and the defendant no. 1 for design and construction of the aforesaid bridges. In the said contract, it is alleged, clause 25 provides for arbitration of any dispute arising out of the execution of the contract. It is further stated that the company respondent could not complete the execution of the contract and the contract was terminated. The company did not challenge the termination of the contract but only applied for arbitration in respect of works done by the company. As the matter was not referred to the arbitrator, the application was made before the Second Court of Subordinate Judge, Alipore, 24 Parganas and as the application was filed the State of Assam showed cause. *inter alia*, contending that the Court of Subordinate Judge has no jurisdiction in the matter to which the agreement relates but only the Court at Shillong in the State of Assam has this jurisdiction. Secondly it is contended that as no notice under section 80 was given, the application under section 20 of the Act is not maintainable and thirdly it is argued by Mr. Dhar on behalf of the appellants that the said clause 25 of the conditions of contract of the Agreement is not an arbitration clause as this is only binding on the contractor and not on the other parties, that is, the State of Assam or the Executive Engineer and also they have no right to refer the matter to the arbitrator and as such there is no mutuality in the contract and therefore the arbitration has no application

or for that matter it is not the arbitration clause. In our opinion in view of the Supreme Court judgment reported in (1) *Hakam Singh v. Gamman (India) Ltd.*, AIR 1971 SC 740 it must be held that the court has jurisdiction to entertain the application if the part of cause of action arose within the jurisdiction of the Court. It must be held that in order to consider the jurisdiction of the Court in the matter of application under section 20 of the Act it has been specifically held that section 20 of the Code of Civil Procedure applies to the Arbitration proceeding also. In the facts of the case it appears that a part of the cause of action certainly arose within the jurisdiction of the Court deciding the application under section 20 of the Act. The acceptance of the tender was communicated to the petitioner at 13C, Deodar Street, Calcutta, and the payment under the said agreement was made at the State Bank of India, Gariahat Branch and furthermore the Bank guarantee was already given at the State Bank of India. In the circumstances, therefore, in our opinion, the part of cause of action upon which the agreement relates arose within the jurisdiction of the Court which decided the matter and therefore there is no merit in the contention of Mr. Dhar on this score.

2. The next question which Mr. Dhar argued is that the notice under section 80 is required for the purpose of the proceeding under section 20 of the Arbitration Act. This question was considered in the cases reported in (2) AIR 1947 Sind, 147 (*Firm Ramchand & Sons v. Governor-General*) (3) AIR 1933 Lahore, 374 (*Gian Singh v. Atma Ram*), and (4) AIR 1966 Cal., 259. Mr. Dhar argued that under section 20(2) of the Arbitration Act it is provided that an application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants if the application has been presented by all the parties or, if otherwise, between the applicant as plaintiff and the other parties as defendants. It has been held that under section 20 (2) of the Arbitration Act it is provided that an application that an agreement be filed in Court shall be numbered and registered as a suit, so an application is a plaint in a suit and therefore attracts section 80 of Civil Procedure Code and as such notice under section 80 of the Code of Civil Procedure is to be given. Under section 22A of the Arbitration Act it is provided that the agreement shall be filed in the Court being under Civil Rules and Orders, Vol-1, 528 Clause 47 and therefore the notice under section 80 of the Act is imperative. In our opinion, this argument cannot succeed. It has been held in the case reported in AIR 1947 Sind, 147 repelling a similar argument advanced as follows :--

“But in my view, it is not until the proceeding is actually before the Court that S. 41, Arbitration Act and the provisions of the Civil Procedure Code apply ; for were I to hold otherwise, so soon as an application to file an agreement is brought before the Court, the

- Court would dismiss the application, because the notice required under S. 80 Civil P.C. had not been given. But S. 80, Civil P.C.,
- would not apply until the proceeding came before the Court. So that it would appear that if I accepted the interpretation of S. 41 put upon it by the learned Subordinate Judge, the provisions of S. 20, Arbitration Act and other sections of the Act and the purpose of the Act would be frustrated S. 80, would not apply until the proceeding came before the Court and when the proceedings came before the Court and S. 80, Civil P. C. applied the application to file the agreement would be dismissed : so the parties to the dispute would get no further."

The Hon'ble Davis, C.J. of the Lahore High Court relied upon the case reported in (5) AIR 1932 Lahore, 374 (*Secretary of State v. Kundan Singh*) in which the learned Chief Justice Shadi Lal dealt with the question of notice under section 80 of the Code of Civil Procedure as applicable to arbitration proceedings. The learned Chief Justice is clearly of opinion that section 80 of the Civil Procedure Code applies only to a suit ; there is a reference in section 80 of the Civil P.C., to the plaint which supports the inference that it applies only to a suit and it may be said that a notice under section 80 of the Civil P.C. is rightly to be given to the Secretary of State when he is made defendant in a suit, for, otherwise, he would be taken by surprise, there can be no question of surprise in the matter of an agreement to which he is already a party and which provides for an arbitration in case of disputes. In the case reported in (4) *SPC Engineering Co v. Union of India*, AIR 1966 Cal. 259 it has been held that no notice under section 80 of the Civil Procedure Code is required in matter coming under section 20 of the Arbitration Act, 1940.

3. The last question which has been agitated by Mr. Dhar is that there is no mutuality in clause 25 of the agreement, inasmuch as, both the parties to the agreement have no right to go to the arbitration but only the contractor who can go to refer the matter to the arbitrator and that the same is binding on the contractor and not binding on the other parties. Mr. Dhar relied upon the case reported in (6) AIR 1971 All 270 (*State of U. P. v. Padam Singh*) and argued that the contract is only binding on the contractor and there is no mutuality at all as an arbitration clause.

4. Mr. Gupta on the other hand, contended that clause 25 is an arbitration clause and has the binding character of the decision of the Chief Engineer but it is on both the parties and not only on the contractor. If the word "contractor" is read separately there cannot be any doubt as argued by Mr. Gupta that this an arbitration clause. For the purpose of the decision of this case, clauses 23 and 25 are relevant which are as follows :—

"23. A certificate of the Executive Engineer, or an award of the referee hereinafter referred to as the case may be, showing the final balance due or payable to the contractor is to be conclusive evidence of the works having been duly completed and that the contractor is entitled to receive payment of the final balance, but without prejudice to the liability of the contractor under the provisions of clause 13.

25. Provided always that in case any question, dispute or difference shall arise between the Executive Engineer and the contractor as to what additions, if any, ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractor, or by reason or on account of any directions or requisitions of the Executive Engineer involving increased cost to the contractor beyond the cost properly attending the carrying out of the contract according to the true intent and meaning of the signed drawings and specification, or as to the works having been duly completed, or as to the construction of those presents or as to any other matter or thing arising under or out of this contract except as to matters left during the progress of the works to the sole decision or requisition of the Executive Engineer under clauses 2,5,11 and 12, in case the contractor shall be dissatisfied with any certificate of the Executive Engineer under clause 8 or under the provision in clause 17 or in case the Executive Engineer shall withhold or not give any certificate, to which the contractor may be entitled then such question, dispute or difference or such certificate or the value, or matter which should be certified as the case may be is to be from time to time referred to the Chief Engineer, Assam, whose decision shall be final, conclusive, and binding on the contractor."

Clause 25 makes it clear, in our opinion, that there is mutuality in the contract and both the parties to the contract referred the disputes for the arbitration to the Chief Engineer. In our opinion, this clause must be referred as arbitration clause read with clause 23 of the agreement. In *State of U. P. v. Padam Singh*, AIR 1971 All., 270 it has been held that the essential characteristic of arbitration is the binding character of the decision of the arbitrator on the parties before him. The very purpose of a arbitration is to resolve disputes between the parties to the agreement. Where the decision of a person is binding on only one of the parties and not on all the parties to the dispute, it cannot said that the function, which the person giving the decision is exercising is arbitral in character. The said case is, however, clearly distinguishable. It is stated in clause 23 of the said agreement that the decision of the Superintending Engineer shall be final conclusive and binding on all parties to the contract. By the first part of clause 23, the Superintending Engineer is empowered to decide disputes between the parties relating to the meaning

of the specifications, designs, drawings and instructions mentioned in the earlier clauses of the agreement, and other part says that his decision will be final and conclusive. Their Lordships considering that provision held that the essential characteristic is absent in the second part of clause 23. In our opinion, however, this case is clearly distinguishable in the facts of this case. From reading clause 25 with clause 23 it is quite clear that the decision shall be final and conclusive and binding on all the parties to the contract. Moreover clause 7 of the Appendix to the Arbitration Clause makes it clear that the award will be binding on all the parties. Section 3 of the Arbitration Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. The word "arbitration agreement" has been defined in section 2(a) of the Arbitration Act to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. In our opinion section 3 of the Arbitration Act provides the implied clause in the 1st Schedule and clause 7 of the First Schedule to the Arbitration Act provides that this a binding force on the parties to the agreement. The First Schedule to the Arbitration Act only provides how the arbitration should proceed and how the arbitrator to be appointed and the time limit etc. etc. It also provides that the award shall be final and binding on the parties and persons claiming under them respectively. In our opinion clauses 23 and 25 of the agreement give power to both the parties to refer the matter to the arbitrator and any award made will be binding on both the parties. Mr. Dhar argued on facts and that the Additional Chief Engineer and Chief Engineer have already made some orders and there cannot be an arbitration by the Chief Engineer at all. The respondent agreed in the clause 25 as also in the application under section 20 of the Arbitration Act to refer the dispute to the arbitrator. We found however that the clause 23 read with clause 25 referred the matter to the arbitration. If the arbitrator by any means cannot act, the Court has the power to supply the vacancy but it is not case of the respondent.

5. In the case reported in (7) 1966(1) All England Law Reports, 349 at 351 it was held by the Court of appeal speaking through Davies, J. : that it is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration ; and it is an essential ingredient in that either party may in the event of a dispute arising refer it in the provided manner to arbitration. In other words, the clause must give bilateral rights of reference. We respectfully agree with the observations but in our opinion clause 23 and 25 read together provide that each party has agreed to refer the dispute to the arbitration and we have held that the award by the referee is binding on both the parties. Another point was argued by Mr. Dhar that the earlier suit which was filed by

the respondent against the State Government and in which the State of Assam is impleaded as the party bars the present suit. In our opinion, there is no substance in this contention. In the said suit only the injunction was prayed against the State Government. Nothing was decided in so far as the dispute referred to the arbitration is concerned. We say however that the learned Judge is wholly wrong in awarding the costs in this matter.

6. In view of the matter, the appeal is allowed to the extent that the award of costs of the application is set aside. The other orders passed by the learned Judge stand. The appeals therefore, succeed to the extent as indicated above. There will be no order as to costs.

Maitra, J. : I agree.

N. C. S.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Salil Kumar Datta

Decision : June 2, 1978

Nriitya Gopal Nandi ... Petitioner

Versus

Gour Mohan Adak ... Opposite party*

Jurisdiction of Court—Direction of Superior Court—Non-compliance of such order by inferior court by inadvertance—Whether such order of inferior court is without jurisdiction—Whether a party complying with such order, though erroneous, would suffer prejudicially for such compliance—Courts' latches—Effect thereof on parties to suit.

Every court is entitled to arrange its own affairs according to its programme in the attending circumstances following always or as far as possible, the directions of the Superior Court. If through inadvertance, error or otherwise an order contrary to the directions of the superior court is made by the inferior court, such order though irregular cannot be said to be without jurisdiction. Such an order continues to be effective and binding on the parties especially when no exception has been taken to it at the appropriate time by the affected parties and the party should not be put to peril by complying with such an order, though erroneous.

Chandra Sekhar Das ... for the Petitioner
Bidyut Kumar Banerjee ... for the Opposite Party

The judgment of the court was as follows :—

This Rule is directed against an Order no. 43 dated November 19, 1976 rejecting plaintiff's petition for reconsideration of the earlier order

*Civil Rule no. 866 of 1977.

of the same Court, being No. 38, dated July 16, 1976. It appears that in the connected appeal the appellate Court directed that the petition for amendment of the plaint filed in the appellate court would be considered by the trial Court provided the plaintiff paid a sum of Rs. 25/- as costs to the defendant within a fortnight of the arrival of record to that Court and in default, the appeal was to stand dismissed which would mean the dismissal of the suit itself as ordered by the trial Court.

2. It appears from Order No. 26, dated October 3, 1975 that records were received back by the trial court on that date along with copy of judgment of the appellate court. The trial Court passed an order on that date directing the parties to take steps by November 15, 1975. It may be mentioned here that the Court closed for long vacation on October 6, 1975 and reopened on November 7, 1975. The plaintiff deposited the amount on November 15, 1975 which was permitted by the learned Munsif by his order No. 27 of date in pursuance of his earlier order. Thereafter, on July 16, 1976, the amendment petition was taken up for hearing in presence of the parties. The learned Munsif, who was successor-in-office to the learned Munsif who passed the order of October 3, 1975, was of opinion while considering the amendment petition that the order of his predecessor bearing No. 27, dated November 15, 1975 permitting the plaintiff to deposit Rs. 25/- was without jurisdiction as the trial court could not act against the direction of the superior Court. Accordingly, application for amendment was dismissed by order No. 38 dated July 16, 1976 in view of the appellate Court's order which *inter alia* provided for dismissal of the amendment petition in case the amount was not paid within fortnight of the arrival of record.

3. The plaintiff filed an application for reconsideration of the order and it appears that the learned Munsif, who was again a successor-in-office to the learned Munsif who passed the order of July 16, 1976, was of opinion that there was no ground for reconsideration of the said order of July 16, 1976. Accordingly, the petition for reconsideration was rejected by Order 43, dated November 19, 1976. This Rule is directed against this order.

4. Mr. Chandrasekhar Das, learned Advocate appearing on behalf of the plaintiff-petitioner contended that the impugned order was unsustainable in law as the plaintiff petitioner acted in terms of the order of the Court which directed him to take steps within November 15, 1975 which was duly taken. He submitted that the plaintiff should not be penalised for any error that might have been committed by the learned Munsif in permitting him to deposit beyond the time allowed by the appellate Court and his order to the effect was never challenged.

5. Mr. Bidyut Kumar Banerjee, learned Advocate appearing on behalf of the defendant-opposite party drew my attention to Order 6 Rule 18 of the Code of Civil Procedure wherein it has been provided that if a

party fails to take steps within the time permitted by the court the penal consequence will follow. Further the order of the learned Munsif of October 3, 1975 it was contended, was without jurisdiction in view of the appellate Court's order and the suit, in view of the default in complying with the appellate order stood automatically dismissed. The proper course the plaintiff would have been to move the first appellate court for modification of its order which was not done.

6. It appears to me that the order of the learned Munsif of October 3, 1975 was an improper order on the face of the appellate Court's order. But it is not possible to say that the order was inherently or otherwise without jurisdiction for that reason only though the order suffers from irregularity. Every court is entitled to arrange its affairs according to its programme in the attending circumstances following always or as far as possible the directions of the superior court. If through inadvertance error or otherwise an order contrary to the directions of the superior court is passed such order though irregular can not be said to be without jurisdiction. The order continues to be effective and binding on the parties when no exception is taken to it at the proper time by affected parties and a party cannot be put to peril by complying with such order though erroneous.

7. In view of the fact that the Court granted time to the plaintiff to take steps by November 15, 1975 the plaintiff accordingly should not be penalised for an order of court which has not been challenged by the defendant, nor it appears the court's attention was drawn to the patent error in the said order. The order of October 3, 1975 remained to be an effectual order as it has not been challenged by the defendant or set aside in appropriate proceeding and it is to be remembered that there was the intervening long vacation. The learned Munsif who succeeded in office was not competent to sit on appeal or to review or to set aside the order of his predecessor as was sought to be done by his order of July 16, 1976 resulting in the dismissal of the suit itself. Accordingly, I do not think that it would be proper to penalise the plaintiff for an error, which was committed by court, depriving him of the benefit given to him by the appellate court and causing dismissal of the suit.

8. In the premises, the Rule succeeds and the impugned order is set aside and the plaintiff's application under Section 151 of the Code of Civil Procedure is allowed. The deposit made by the plaintiff on November 15, 1976 will be deemed as deposit in compliance with appellate Court's order in the circumstances. The suit will now proceed for hearing in accordance with law.

9. The Rule is thus made absolute. The petitioner will pay cost of this Rule to the opposite party. Hearing fee is assessed 3 gold mohurs.

P.R.

[CIVIL REVISIONAL JURISDICTION]

*Before Mr. Justice Murari Mohan Dutt and Mr. Justice
Dhires Chandra Chakravarti*

Decision : June 6, 1978

Crompton Greaves Ltd. Petitioner

Versus

Hindusthan Steel Ltd. Opposite party*

Arbitration Act (X of 1940), Sec. 33—Application under—Maintainability—Scope of—Production of award in court—Determination of the effect of arbitration agreement, whether Award is to be produced.

Arbitration Act (X of 1940), Sec. 5—Revocation of authority of arbitrator or umpire—Meaning of—Scope.

The opposite party made an application under section 33 of the Arbitration Act 1940 and obtained an order from the trial court which is being challenged by the petitioner in a revisional application.

The first question for determination is whether the application under section 33 of the Act is maintainable. It appears that while the hearing of the arbitration proceeding was continuing, the opposite party filed an application before the Arbitrators for modification of the issues as framed in the proceeding and the Arbitrators made an order on the said application.

HELD : Under section 33 of the Act, a party to the arbitration agreement may challenge the existence or validity of an arbitration agreement or an award or may ask for the determination of the effect of an award or an arbitration agreement. If the award is challenged, there can be no doubt that the award must be produced. But when the party prays for the determination of the effect of an arbitration agreement, there can be no question as to the production of the award.

It is argued that the same principle as embodied in section 23 (2) should be followed by the court in dealing with an application under section 33.

HELD : Section 33 does not give any indication whatsoever that the effect of an arbitration agreement cannot be decided by the court after the arbitrators have entered upon the reference. Section 23(2) stands on a different footing. After the court makes a reference of a dispute to arbitration, it shall not deal with the same in the suit so long as the arbitration proceeding will remain pending. The principle behind the provision of section 23 seems to be that the court making the reference to arbitration should not ignore such reference and usurp the jurisdiction to decide the dispute itself pending such arbitration. In the instant case, the reference has not been made by the court but by the parties themselves and therefore there is no impediment for the court to decide the scope and effect of the arbitration agreement.

*Civil Rule no. 320 of 1978.

The revocation of the authority of an Arbitrator or an Umpire as provided in section 5 contemplates the cancellation of the appointment of the Arbitrator or Umpire. If on an interpretation of an arbitration agreement under section 33, the court determines its effect, as a result of which the Arbitrator will not be entitled to decide a particular dispute between the parties such determination would not be revocation of the authority of the Arbitrator under section 5. In any event, section 5 should be read subject to the provision of section 33. Moreover it is clear from section 5 that the authority of an Arbitrator or Umpire can be revoked with the leave of the court.

In the instant case, the court can not decide whether the issues which have been framed by the Arbitrators are germane to the dispute referred to them. All that the court can say is that the arbitrators are only concerned with the dispute as to the ownership of the surplus cables and that they have no power nor jurisdiction to any award on the basis of section 70 of the Contract Act.

Case referred to :—

(1) *Prafulla Chandra Karmakar v. Panchanan Karmakar*, 50 CWN 287

T. K. Biswas and Rupen Mitra for Petitioner
Noni Coomar Chakravarty and Pashupati Nath Chunder ..for Opposite party

The judgment of the Court was as follows :—

Dutta, J. : This Rule is at the instance of the petitioner Crompton Greaves Limited and it is directed against order no. 23 dated September 22, 1977 of the learned Subordinate Judge, Burdwan. By the said order, the learned Subordinate Judge allowed the application of the opposite party Hindusthan Steel Limited under section 33 of the Arbitration Act, 1940.

2. It appears that on December 23, 1965 the petitioner and the opposite party entered into a contract for the erection of the power distribution system and putting them into commission on the "turn-key" basis to be executed by the petitioner, the contractor. After the "turn-key" job was completed and the power distribution equipment was put into commission, the petitioner found some surplus cables lying in its custody which were not incorporated in the said "turn key" job. The petitioner claimed that the said surplus cables belonged to it while the opposite party claimed title and ownership to the same. So a dispute arose between the parties as to the ownership of the surplus cables. The contract dated December 23, 1965 contained an arbitration clause and the dispute between the parties over the ownership of the surplus cables was referred to the arbitration of two Arbitrators one nominated by the petitioner and the other by the opposite party. After the Arbitrators had entered on the reference, the petitioner filed a statement of facts and the opposite party filed a Counter State of Facts. The Arbitrators raised as many as 8 issues of which issues 4 and 5 are as follows :

"4(a). Is the statement of quantities of surplus cables and their values made in schedule "A" to the Statement of Facts correct ?

(b) Is the claimant liable to render any account of cables imported or to deliver surplus cables, to the Respondent as alleged in paragraph 10 of the Counter State of Facts or at all ?

(c) To whom the surplus cables belonged after completion of the entire construction works ?

5(a). If the property in the surplus cables had vested in the Respondent, is the Respondent liable to pay to the Claimant the value thereof either under the terms of the contract or under the provision of section 70 of the Indian Contract Act.

(b) Is the Claimant entitled to be reimbursed the expenses incurred in connection with the storage, insurance etc. of and in respect of the surplus cables ?

(c) Is the Respondent entitled to claim a set-off as alleged in paragraph 18 (b) of the Counter State of Facts."

While the arbitration proceeding was going on, an agreement dated May 14, 1973, was entered into by and between the parties whereby various other disputes between them were settled. Clause (2) of the said agreement is as follows :

"That the issue regarding the ownership of surplus cables already referred to Arbitration by both the parties under the terms and conditions of the subject contract shall be kept outside the scope of this Agreement."

Before the said agreement dated May 14, 1973, the petitioner examined one witness in the arbitration proceeding. The evidence of the second witness of the petitioner, who was examined after the said agreement dated May 14, 1973, was cancelled by consent of parties. Thereafter on February 20, 1975, the opposite party made an application before the Arbitrators praying for the following orders :

"(a) An order be made recording that all the disputes which are subject-matter of the present proceedings other than the dispute relating to the ownership or title of the cables in question have been adjusted by lawful agreement or compromise.

(b) All the issues raised by the learned Arbitrators which do not relate to the question of ownership or title of the cables be expunged or deleted.

(c) Directions be given on the claimant not to adduce or lead any evidence relating to the question other than the question of ownership or title of the cables.

(d) Such further or other direction or directions be given and/or orders be made as may seem fit and proper to the learned Arbitrators."

It was contended in the said application that after the reference to arbitration was made, all outstanding issues between the parties relating to or

arising out of the contract dated December 23, 1965 was settled by the said agreement dated May 14, 1973 excepting the issue relating to the title or ownership of the cables in question. It was submitted by the opposite party that the learned Arbitrators should delete or expunge all the issues raised by the parties which do not relate to the question of ownership of or title to the cables in question.

3. The Arbitrators, after considering the submissions made on behalf of both the parties, *inter alia*, passed the following orders ;

“It was shown to us that the parties had acted on the footing of the agreement dated 14.5.73.

In view of this there seems to be no justification for taking up for decision by us any issue except issues 4 and 5 mentioned above. We have heard the submissions made by the learned Counsel on behalf of the parties and considered the decisions cited by them.

We make an order in terms of prayers (a), (b) and (c) of the Respondent's petition verified on its behalf on 20.2.75, but in the circumstances of the case we make no order as to the costs on the Respondent's application.

We direct that the Arbitration will go on, its scope being limited, however, to Reference no. 2 and Reference no. 3 as mentioned in the Statement of Facts and to issues (4) and (5) settled as stated above.”

4. The opposite party was not satisfied with the said order of the Arbitrators and filed an application under section 33 of the Arbitration Act before the learned Subordinate Judge, praying for an order deciding the effect of the arbitration agreement dated December 23, 1965 read with the subsequent agreement dated May 14, 1973. It was contended in the said application that the order of the Arbitrators dated October 1, 1965 was bad and invalid in so far as the same purported to direct that the arbitration would go on in respect of issues 4 and 5, and that the last portion of the said order was contradictory to the earlier portion. The said application was opposed by the petitioner. It was contended by the petitioner that the application was not maintainable unless the award had been filed in Court. Further, it was contended that the decision of the Arbitrators that the Arbitration will proceed in respect of issues 4 and 5 was in accordance with the agreement dated May 14, 1973.

5. The learned Subordinate Judge came to the finding that the application under section 33 was maintainable overruling the contention of the petitioner that unless the award was filed in Court, the opposite party had no *locus standi* to file an application under section 33. The learned Subordinate Judge took the view that the Arbitrators had passed a conflicting order, and that they ought to have held that they had no jurisdiction to take up and decide any issue except the issue relating to the ownership of the surplus cables. Accordingly, he held that the Arbitrators had no jurisdiction to decide any issue other

than the issue in respect of ownership of the cables, and that they had no power nor jurisdiction to pass any award on the basis of section 70 of the Indian Contract Act. Upon the said findings, the learned Subordinate Judge allowed the Misc. Case arising out of the said application under section 33 of the Arbitration Act. Hence this Rule.

6. We may first of all consider the question of maintainability of the application under section 33 which is set out as follows :

"Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

Under section 33, a party to the arbitration agreement may challenge the existence or validity of an arbitration agreement or an award or may ask for the determination of the effect of an award or an arbitration agreement. If the award is challenged, there can be no doubt that the award must be produced. But when the party prays for the determination of the effect of an arbitration agreement, there can be no question as to the production of the award. It is, however, contended on behalf of the petitioner that the said order of the Arbitrators dated October 1, 1975 is an award. We are unable to accept the contention. By no stretch of imagination can it be said that by the said order the Arbitrators decided the dispute or any part thereof which was referred to them by the parties. The said order is not, therefore, an award as contended on behalf of the petitioner.

7. It is next argued on behalf of the petitioner that although there is a prayer by the opposite party for the determination of the effect of the arbitration agreement and also the agreement dated May 14, 1973, really the opposite party was challenging the said order of the Arbitrators and, as such, the application was not strictly one under section 33 of the Act. It is contended that the Court cannot adjudicate the propriety of the said order of the Arbitrators. It is true that the prayers made in the application under section 33 also include a challenge to the legality and validity of the said order of the Arbitrators, but the principal prayer of the opposite party was for the determination of the effect of the arbitration agreement dated December 23, 1965 and the subsequent agreement dated May 14, 1973. In view of such a specific prayer, the other prayers may be ignored.

8. It is argued on behalf of the petitioner that the same principle as embodied in section 23(2) should be followed by the Court in dealing

with an application under section 33. Section 23(2) provides that where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in the Act, deal with such matter in the suit. Section 23 relates to arbitration in suits. It is, however, contended that as the dispute is being considered by the Arbitrators, an application, under section 33 is not maintainable. In our view, this contention is without any substance. Section 33 does not give any indication whatsoever that the effect of an arbitration agreement cannot be decided by the Court after the Arbitrators have entered upon the reference. Section 23(2) stands on a different footing. After the Court makes a reference of a dispute to arbitration, it shall not deal with the same in the suit so long as the arbitration proceeding will remain pending. The principle behind the provision of section 23 seems to be that a Court making the reference to arbitration should not ignore such reference and usurp the jurisdiction to decide the dispute itself pending such arbitration. In the instant case, the reference has not been made by the Court, but by the parties themselves and, therefore, there is no impediment for the Court to decide the scope and effect of the arbitration agreement. The Bench decision in (1) *Prafulla Chandra Karmakar v. Panchanan Karmakar*, 50 CWN 287 laying down the principle, that after a reference to arbitration has been made in a suit through the intervention of the Court, the parties cannot be allowed, by mere consent to abandon the arbitration and go on with the suit or ask for a fresh reference, has no manner of application to the instant case.

9. It is next contended on behalf of the petitioner that by laying down the effect of the arbitration agreement dated May 17, 1973, the learned Subordinate Judge really revoked the authority of the Arbitrators which he could not. In support of this contention reliance has been placed on behalf of the petitioner on section 5 of the Arbitration Act which provides that the authority of an appointed Arbitrator or Umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. We fail to understand how by interpreting an arbitration agreement and determining the effect thereof the Court cancels or revokes the authority of the Arbitrator. The revocation of the authority of an Arbitrator or an Umpire as provided in section 5 contemplates the cancellation of the appointment of the Arbitrator or Umpire. If on an interpretation of an arbitration agreement under section 33, the Court determines its effect, as a result of which the Arbitrator will not be entitled to decide a particular dispute between the parties, such determination would not, in our view, be revocation of the authority of the Arbitrator under section 5 of the Arbitration Act. In any event, section 5 should be read subject to the provision of section 33 of the Arbitration Act. Moreover, it is clear from section 5 that the

authority of an Arbitrator or Umpire can be revoked with the leave of the Court. There is, therefore, no substance in the contention of the petitioner based on section 5 of the Act.

10. The only dispute between the parties before the agreement dated May, 14, 1973 was executed, was about the ownership of the surplus cables. It was that dispute alone that was referred to the Arbitrators. It appears from the agreement dated May 14, 1973 that the parties had other disputes between them and those disputes were settled by the said agreement. Lest there should be any confusion as to the scope of the arbitration proceeding, it was clearly provided in the said agreement dated May 14, 1973 that the issue regarding the ownership of surplus cables already referred to arbitration by both the parties under the terms and conditions of the subject contract would be kept outside the scope of that agreement. It is not the case of either party that the dispute as to the ownership of surplus cables is not covered by the arbitration agreement dated December 23, 1965, and that the said dispute has been kept unsettled between them by the subsequent agreement dated May 14, 1973. The effect of the said arbitration agreement and the subsequent agreement is that beyond the dispute as to the ownership of the surplus cables the Arbitrators will not have any jurisdiction to decide any other disputes between the parties. In this connection, we may also refer to clause (ii) of the agreement dated May 14, 1973 which *inter alia* provides as follows :

"That the above agreement shall form part and parcel of the said contract and that neither of the parties shall have any further claim whatsoever in connection with or arising out of the subject contract except to the extent mentioned above in the preceding paragraphs."

This clause has made abundantly clear that the only existing dispute between the parties is the dispute over ownership of surplus cables.

11. It is amply clear from the said order dated October 1, 1975 of the Arbitrators that they were also of the view that excepting the dispute about the ownership of the cables, all other disputes have been settled between the parties. The Arbitrators, however, thought that issues 4 and 5 which have been referred to above relate to the dispute about the ownership of the surplus cables. We do not find that there is any conflict between the first part and the latter part of the order of the Arbitrators. The question, however, is whether issues 4 and 5 including the sub-issues thereunder relate to the dispute as to the ownership of the surplus cables. It may be said that the Court is not concerned with what issues will be framed by the Arbitrators over the dispute referred to them by the parties. Under section 33, the Court is only concerned with considering the existence or validity

of an arbitration agreement or the validity of an award or the determination of the effect of an arbitration agreement or an award. In the instant case, the Court cannot decide whether the issues which have been framed by the Arbitrators are germane to the dispute referred to them. All that the Court can say and it has been, in our opinion, rightly held by the learned Subordinate Judge that the Arbitrators are only concerned with the dispute as to the ownership of the surplus cables, and that they have no power nor jurisdiction to pass any award on the basis of section 70 of the Indian Contract Act. It may, however, be stated in this connection that the Arbitrators, while deleting all other issues excepting issues 4 and 5 have overlooked clause (11) of the agreement dated May 14, 1973. Be that as it may, after considering both the agreements we hold that the Arbitrators will not have any jurisdiction to decide any dispute other than the dispute as to the ownership of the surplus cables. Further, we would like to observe that the Arbitrators will be entitled to decide any issue or any matter without deciding which the dispute as to the ownership of the surplus cables cannot be decided. In that case, only such issue or the matter will relate to the dispute as to the ownership of the cables. But if the issue as to the ownership of the surplus cables can be decided independantly of any other issue or issues, we are afraid, the Arbitrators will have no jurisdiction to decide such other issue or issues. As we have already said that it is not for the Court to consider the propriety of the issues framed by the Arbitrators, we refrain from expressing any opinion on the same. The Arbitrators, however, will be at liberty to reconsider their decision in the light of the observations made above.

12. The Rule is disposed of as above. There will be no order for costs.

Chakravorti, J. : I agree.

S. P. M.

[CIVIL APPELLATE JURISDICTION]

• Before Mr. Justice Anil Kumar Sen and Mr. Justice
Bhabesh Chandra Chakrabarti

Decision : July 10, 1978

• United Commercial Bank Ltd. & Ors....

...Appellants

Versus

• Director, Enforcement Directorate & Ors.

...Respondents*

Foreign Exchange Regulation Act (7 of 1947), Secs 3(3), 4(2) & 23D—
Contravention—Proceeding initiated by Adjudicating Authority—Show cause
notice—Validity of jurisdiction of such authority challenged in writ applica-
tion—Preliminary objections—Maintainability of writ proceeding—Delay

*F. M. A. nos. 363 and 511 of 1977.

—Alternative remedy—Non-joinder of necessary party.

Foreign Exchange Regulation Act (46 of 1973), Secs. 5 & 51—Scope of—Not an amending Act—Effect thereof.

Exchange Control Manual—Sec. 28—Non-compliance of requirements under—Effect thereof—Criminal liability.

Two adjudication proceedings were started by the Special Director, Enforcement Directorate, respectively under section 23D of the Foreign Exchange Regulation Act 1947 and section 51 of the Foreign Exchange Regulation Act 1973 based on more or less identical allegations. The appellants in their respective writ petitions challenged the very jurisdiction of the adjudicating authority to hold any adjudication proceeding as proposed on the allegations made in the respective show cause notices.

HELD: The substantial issue which needs to be determined is as to whether the two show cause notices at all make out any case for adjudication under section 23D of the Foreign Exchange Regulation Act 1947. Under section 23D, the adjudicating authority has the jurisdiction to hold an enquiry for adjudicating under section 23(1)(a) whether any person has committed any contravention referred to in section 23(1) of the Act, Section 23(1) speaks of contravention of sections 4,5,9,10,12(2), 18A, 18B or of any rule, direction or order made thereunder. In the show cause notices on which the impugned adjudication proceedings had been initiated what is alleged to have been contravened by the appellant/petitioners is section 4(2) of the said Act and not any of the other provisions referred to in section 23(1).

The provisions of section 4(2) enjoin that no one shall enter into any transaction which provides for conversion of Indian currency into foreign currency or vice versa at rates of exchange other than the authorised rates. Such a prohibition in its turn is subject to a proviso that one can enter into such a transaction if it is so done with previous general or special permission of the Reserve Bank. Therefore, in a case where the transaction provides for conversion at authorised rates there arises no necessity of obtaining permission in any manner from the Reserve Bank.

It is alleged that in entering into the forward contract there has been a contravention of paragraph 3, Clause (ii) (b) of section 28 of the Manual. On a plain reading of section 4(2) and Section 28(3) of the Manual, it is clear that the requirements prescribed by the Instructions incorporated in section 28 are not the requirements of section 4(2). Sec. 4(2) speaks of authorisation of the rate of exchange and of a general or special permission in the case of transactions providing conversion at a rate other than the rate so authorised. Section 28 of the Manual covers a different field altogether. It has been held that to the extent the show cause notices proceed on the basis that the fulfilment of the requirements of section 28(3) of the Manual constitutes a general permission contemplated by section 4(2) is concerned such notices

are based on an erroneous idea about the legal position. Firstly, the question of general or special permission does not arise at all since the transaction itself provided for conversion at the authorised rate. Secondly, section 28(3) itself does not specify that the fulfilment of the requirements thereof constitutes any general permission of the Reserve Bank. Section 28 obviously was meant for other purposes and comes under either section 3(3) or section 20(3) of the said Act. Contravention of these provisions may constitute independent offences resulting in independent liabilities but that does not constitute violation of section 4(2) of the Act or any other provisions specified in section 23(1) of the Act which cannot authorise an adjudication under section 23D. Therefore, even if there had been a violation of section 28(3) in the matter of entering into the forward contract between the appellant/petitioners in the instant case that does not amount to violation of section 4(2).

Section 23(1) imposes a criminal liability when it provides that any person contravening section 4 shall not only be liable to such penalty as specified in clause (a) that may be adjudged by the Director of Enforcement, but shall, upon conviction by a court, be punishable with imprisonment for a term which may extend to two years or with fine or both. Such a provision must be strictly construed. When section 4(2) provides that no person shall enter into any transaction which provides for conversion of Indian currency into foreign currency or foreign currency into Indian Currency at rates of exchange other than the authorised rate, none should contravene the prohibition imposed by this provision in the transaction they enter into. That prohibition only relates to the rate and is irrespective of - the transaction being otherwise valid or invalid. It is not permissible to impose collaterally a criminal liability under section 23(1) by pleading that the transaction itself being otherwise invalid though it provided for conversion at the authorised rate, such rate would not be of any avail and the transaction must be construed to be one not at the rate so agreed. The only point that arises for consideration on a charge of the present nature is to find out whether in entering into the transaction, otherwise valid or invalid, there had been any conversion at a rate other than the authorised rate so that only in a case where there is a conversion at a rate other than the authorised rate the person concerned may be charged for having contravened section 4(2) of the Act.

By making the forward purchase from the Reserve Bank, the instant Bank cannot be said to have violated section 4(2) nor is it so alleged in the show cause notice. The real grievance is on the score that the said bank had such (pound) sterling released on misrepresentation made to the Reserve Bank. Such alleged misconduct on the part of the instant Bank does not, however constitute a contravention of any of the provisions specified in section 23(1) and as such cannot be the subject matter of any adjudication under section 23D of the Act.

The Foreign Exchange Regulation Act 1973 is not an amending Act and does not propose to amend the 1947 Act so that it can be said to amend the procedural part with retrospective effect. The 1973 Act repeals the old Act subject to the savings under section 6 of the General Clauses Act and section 81 of the 1973 Act. Such saving provisions may save the liability incurred by the appellant and may save the right to initiate appropriate proceedings under the old Act for enforcement of such liabilities. Under Section 81 the pending proceedings may well be proceeded with as if initiated under the corresponding provisions of the new Act. But these saving provisions do not extend the jurisdiction of the Director of Enforcement to adjudicate any contravention of a provision of the old Act which was not capable of such adjudication by him. Section 51 of the 1973 Act provides that the adjudicating authority can hold an adjudication in respect of contravention of any of the provisions of the said Act. In the instant case, the appellant petitioner can not be said to have contravened any of the provisions of the 1973 Act, because the said Act was not there when the contravention alleged had been committed. An adjudication proceeding initiated under section 23D can no doubt be continued under section 51 in view of section 81, but that presupposes that such a proceeding was competently initiated under section 23D. A proceeding which could not have been initiated under section 23D can not be continued under section 51.

It was contended by the Respondents that appellants/petitioners are guilty of inordinate delay in moving the writ application. That contention is not tenable. It appears from records that there was no real delay based on the appellants' laches.

The preliminary objection as to the maintainability of the writ petitions is that the appellant-petitioners having submitted to the jurisdiction by filing defences to the show cause notices, they cannot any longer challenge the jurisdiction of the adjudicating authority. Such an objection is liable to be overruled because when the adjudicating authority inherently lacks jurisdiction the allegations not constituting any contravention of section 4(2)—no amount of consent could confer upon the said authority the necessary jurisdiction to hold such an adjudication. Moreover the appellants never submitted to the jurisdiction of the adjudicating authority which is apparent on the causes shown by them. They specifically raised an objection to the maintainability of such an adjudication proceeding and in showing cause reserved their right to challenge the adjudicating authority's jurisdiction to proceed with the adjudication proceeding. Under the "Adjudication proceedings and Appeal Rules", they are entitled if not obliged to raise such an objection at the first instance before the adjudicating authority and invite his decision thereon and by doing so they cannot be said to have submitted to the jurisdiction of that authority to hold the adjudication even if the same is otherwise without jurisdiction.

The next objection as to maintainability of the writ petitions is that

an alternative remedy bars the proceedings initiated in writ jurisdiction of this court. The fact that the appellant petitioners have a right of appeal against the final order that may be passed by the adjudicating authority, cannot be considered to be an alternative remedy.

Case referred to :—

- (1) *Union of India v. Shreeram Durga*, AIR 1970 SC 1597
R. C. Deb, Sidhartha Sankar Ray, D. P. Gupta, Biswarup Gupta, R. N. Bajoria, S. S. Khanna and ...
R. K. Khanna ... for the Appellants in F.M.A no. 363 of 1977
Sidhartha Sankar Ray, D. P. Gupta, Biswarup Gupta, R. N. Bajoria, S. Pal, Promode Khaitan and ...
Padam Khaitan for the Appellants in F.M.A no. 511 of 1977
Nani Coomar Chakraborti and Rathindra Nath Das ...
 ... for the Respondents in both the appeals

The judgment of the court was as follows :—

Sen, J. : These are the two appeals under clause 15 of the Letters Patent directed against the judgment and order dated February 18, 1977, passed by a learned single judge of this court. By the judgment and order under appeal the learned judge dismissed the two writ petitions and discharged two Rules issued thereon. Those two writ petitions which were heard together were preferred by the present appellants challenging therein two adjudication proceedings initiated by the Special Director, Enforcement Directorate, respectively under section 23D of the Foreign Exchange Regulation Act, 1947 and section 51 of the Foreign Exchange Regulation Act, 1973, based on more or less identical allegations. Facts which led to the initiation of such proceedings may shortly be set out as hereunder.

2. United Commercial Bank Limited (hereinafter referred to as the said bank) appellant in one of these appeals is a company incorporated under the Companies Act, and at the material time in the year 1966 was carrying on banking business as one of the scheduled banks of India until it was nationalised on June 19, 1969. The said bank was also an authorised dealer within the meaning of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as the said Act) duly authorised by the Reserve Bank to deal in foreign exchange. The said bank had extensive foreign exchange business and in course of such business it had dealings with a large number of constituents. Hindusthan Motors Limited (hereinafter referred to as Hindusthan Motors) appellant in the other appeal was one of such constituents of the said bank at the material time. Hindusthan Motors was manufacturing commercial vehicles, namely, Bedford Trucks in collaboration with Messrs, Vauxhall Motors Limited, London. For its manufacturing process, the said Hindusthan Motors used to import

components, parts and machineries from their collaborator and also raw materials like steel etc., from an agent at London, namely, East India Produce Company Limited (hereinafter referred to as EIP) against valid import licence for importation of varied goods issued by the Government. The agency in favour of EIP had the sanction of the Reserve Bank of India. Bills against such importation for the price of the goods so imported were being cleared through the said bank.

3. In course of such transaction, Hindusthan Motors approached the said bank in the last week of May 1966 with a request to book a forward exchange contract for sale of sterling for imports to be made in course of the next 6 months against valid import licence. According to the said bank, the relevant papers and documents being placed before them by Hindusthan Motors, they were satisfied that Hindusthan Motors was asking for a forward exchange contract for sale of sterling to cover imports to be made against a valid import licence and that the importer had already placed firm orders with their collaborators and EIP which had been accepted by them. In such circumstances they entered into a foreign exchange contract No. 130/66 for sale of sterling to the extent of Rs. 1.25 crores equivalent to (pound) 9, 32, 617 within next six months from the date of the contract, viz., June 4, 1966. In that contract the rate for the conversion that was agreed to was the rate authorised by the Reserve Bank for such forward contracts, viz., Shilling 1.5-29/32 = Re. 1/-. In order to cover the said contract, the said bank on that very day, entered into a contract with the Reserve Bank of India for forward purchase of (pound) 7,00,000 to be delivered within 6 months from that date, and the said bank further made ready purchase of (pound) 1,32,000 from other banks.

4. June 4, 1966, was a Saturday and on June 6, 1966, the Indian rupee was de-valued. As a result of such de-valuation before the banking hours of the morning of June 6, 1966, an inspection was carried out at the said bank's establishment by the officials of the Reserve Bank of India which was followed by a special inspection by the department of Banking Operation and Development of the Reserve Bank of India. It would appear from the correspondence between the said bank and the Reserve Bank of India that at first some doubts were entertained as to whether the said bank had entered into the aforesaid forward exchange contract for (pound) 9,32,617 sterling with the Hindusthan Motors being their contract No. 130/66-after due verification of firm orders being placed by Hindusthan Motors and accepted by the sellers in terms of paragraph 3(ii) of section XXVIII of the Exchange Control Manual then in force. Explanations, clarifications, informations and other particulars were sought for by the Reserve Bank of India to satisfy itself that the aforesaid forward exchange contract No. 130/66 was entered into in a regular manner and pending such satisfaction release of foreign currency against the said bank's forward purchase of (pound) 7,00,000 was held back. Ultimately, however,

after concluding its enquiries, the Reserve Bank of India by its letter dated December 22, 1966, released the sterling forward purchased by the said bank when the Reserve Bank informed the said bank : "You have our permission to take delivery of (pound) 7,00,000 under the captioned contract dated the 4th June, 1966, for the like amount." According to the said bank, such release was made by the Reserve Bank when the said Reserve Bank on its own enquiries fully satisfied itself about the regularity and bonafides of the bank's forward exchange contract No. 130/66 with the Hindusthan Motors.

5. Pending such enquiries by the Reserve Bank, the said Bank had from time to time beginning from July 8, 1966, had to pay the bills against importations made by Hindusthan Motors covered by the afore-said forward exchange contract No. 130/66. All such payments, however, were made by the said bank not on the conversion rate as agreed to in the forward exchange contract No 130/66 but at the new current rates prevailing on the dates of such payment pending final decision of the Reserve Bank of India. Once, however, the Reserve Bank gave its decision dated December 22, 1966, all the excess recoveries made by the said bank from the Hindusthan Motors attributable to the difference between the contract rate and the new rate were refunded and/or credited to the account of Hindusthan Motors. Matters rested there until August 30, 1971, when two of the high officials of the said bank were arrested by the Enforcement Directorate for alleged contravention of section 4(2) and section 22 of the said Act in respect of the said forward exchange contract No. 130/66. Those officials were ultimately discharged by the Chief Presidency Magistrate on June 8, 1974, as the prosecution failed to put forward any charge whatsoever against them.

6. In the meantime, on November 3, 1972, the said bank was served with a show cause notice by the Director of Enforcement calling upon the bank to show cause why adjudication proceedings under section 23D of the said Act should not be held against them. This show cause notice runs over 9 pages and is to be found at pages 145 to 153 of the Paper Book. Looking at the substance, it appears that two-fold charges were put forward against the bank. The first charge that was levelled against the bank is that the bank converted various amounts payable by Hindusthan Motors totalling (pound) 9,32,221-17-1d. in respect of import bills received by the bank and payable by Hindusthan Motors during the period 8.7.66 to 3.3.67 at the conversion rate of shilling 1.5 29/32 = Re. 1/- (that is. the forward rate) in terms of the forward exchange contract No. 130/66 dated June 4, 1966 and not at the post devaluation rate prevailing on the dates of actual conversion. Such conversion at a rate not the rate prevailing on the date of conversion, it was claimed it had neither general nor special prior permission of the Reserve Bank of India. There was no general permission since in entering

into the forward exchange contract the bank had not duly fulfilled the terms and conditions specified in paragraph 3 of section 28 of the Exchange Control Manual which constitutes prior approval of the Reserve Bank of India for forward sale of foreign currency. It was alleged that the bank failed to fulfil those terms and conditions by failing to verify whether the forward exchange contract was being entered into to cover importation against firm orders placed by Hindusthan Motors and accepted by the sellers. There was no special prior permission of the Reserve Bank for such conversion. Accordingly, it was claimed that the said Bank had contravened the provisions of section 4(2) of the said Act when the bank allowed conversion at a rate not being the rate prevailing on the date of conversion. The second charge levelled against the said bank was to the effect that the said bank effected forward purchase of (pound) 7,00,000 from the Reserve Bank of India at the rate of shilling 1.5-29/32 = Re. 1/- and got release of the said foreign exchange from the Reserve Bank inducing the bank to do so on the basis of misrepresentations and false informations furnished to the said bank. This in substance is the charge on which the Director of Enforcement proposed to hold an adjudication under section 23D of the said Act.

7. A similar show cause notice was issued on April 3, 1974, by the Director of Enforcement on Hindusthan Motors Limited based on allegations similar to those made against the said bank in respect of the first of the two charges as above, calling upon Hindusthan Motors to show cause why appropriate adjudication proceedings should not be held against them for their contravening section 4(2) of the said Act and thereby rendering themselves liable to be proceeded against under section 23(1)(a) of the said Act.

8. The said bank and Hindusthan Motors showed cause. In showing cause they raised a defence that the allegations made in the respective show cause notice do not make out any case of contravention of section 4(2) of the said Act or any other contravention in respect of which an adjudication as proposed could be held. That objection was overruled by the Director of Enforcement, the adjudicating authority who made an order under Rule 3(3) of the Adjudication Proceedings & Appeal Rules in each of the cases directing the proceedings to be held. Thereupon the said bank and Hindusthan Motors moved two independent writ petitions in this court challenging the very jurisdiction of the adjudicating authority to hold any adjudication proceeding as proposed on the allegations made in the respective show cause notices.

9. The very same objection was raised before the learned trial judge by the petitioners. It was contended that the show cause notices on the face of them do not disclose any contravention of section 4(2) of the Act for which an adjudication under section 23D as proposed can be held in accordance with law. It was contended on their behalf that

when the conversion was effected at a rate or more precisely at a forward exchange rate authorised by the Reserve Bank for the time being, there was no contravention of section 4(2). It was further contended that the charge as framed was based upon a misconception since the conversion being at the authorised rate, no question of taking permission from the Reserve Bank—either general or special—did arise. In initiating the proceedings, it was wrongly assumed that conversion though made at an authorised rate would constitute violation of section 4(2), if it be made without the permission of the Reserve Bank. The learned judge in the trial court took the view that when on the charges levelled against the forward exchange contract had been entered into without fulfilling the conditions laid down in section 28 of the Manual, the contract becomes void so also the rate agreed between the parties in such contract. Such being the position, the actual conversion should have been made not at the rate so agreed though the same may be the authorised rate for forward exchange contract but should have been made at the post devaluation rate prevalent during the period 8.7.66 to 3.3.67. The petitioners not having done so nor having obtained any previous General or special permission of the Reserve Bank to do it otherwise, it cannot be said that the show cause notices do not *prima facie* disclose any contravention of section 4(2) of the Act. In that view the learned judge discharged the Rules. Feeling aggrieved, the petitioners have preferred the present appeals.

10. Mr. Gupta appearing on behalf of the said bank in one of these appeals has strongly contended that of the two charges levelled against the bank the second one does not constitute contravention of any of the provisions referred to in section 23(1)(a) of the said Act so that there can be no adjudication proceeding thereon under section 23D. So far as the first charge is concerned, according to Mr. Gupta the adjudicating authority can assume jurisdiction only if the allegations constitute contravention of section 4(2) of the said Act as claimed in the show cause notice but not otherwise. But according to Mr. Gupta on the face of the allegations made in the show cause memo when it appears that the said bank allowed conversion at a rate, agreed to between the parties in terms of a forward exchange contract and that rate was the authorised rate of the Reserve Bank for a six months forward sale on the date the contract was entered into, there can be no contravention of section 4(2) which only forbids entering into any transaction providing for conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank. According to Mr. Gupta no question of any previous special or general permission from the Reserve Bank arises since the transaction that was entered into provided for conversion at a rate for the time being authorised by the Reserve Bank of India. Any deviation from that rate might have required any such permission but

where there was no such deviation any permission is wholly unnecessary. According to Mr. Gupta, even assuming for a moment that the said bank in entering into the disputed forward exchange contract had not strictly complied with the regulations incorporated in section 28(3) of the Exchange Control Manual by entering into such a contract without being properly satisfied that Hindusthan Motors had placed firm orders for the imports for which the contract for forward sale was being entered into, such contravention may otherwise be punishable under the Act but certainly does not constitute contravention of section 4(2) of the Act authorising an adjudication proceeding under section 23D. According to Mr. Gupta the only obligation which can be said to have been imposed by section 4(2) is to see that all transactions which provide for conversion is at a rate for the time being authorised by the Reserve Bank. Reserve Bank under paragraph 13 of section 1 of the Exchange Control Manual authorised that "(a) the rates of exchange governing transactions in or relating to sterling shall be those published by the Foreign Exchange Dealers' Association of India." Now, in the present case it has been pointed out by Mr. Gupta that when the bank on June 4, 1966, entered into the disputed transaction with the Hindusthan Motors providing for conversion of Indian currency into (pound) sterling on any date within 6 months from that date, such conversion was agreed to be made at the rate of shilling 1.5 29/32=Re. 1/- which was the rate for the time being published by the Foreign Exchange Dealers' Association of India for forward sales between 1 to 6 months and, therefore, it cannot be said that there had been any violation of section 4(2). According to Mr. Gupta, the learned judge in the trial court failed to appreciate that when section 4(2) speaks of a transaction, it only speaks of factual transaction irrespective of whether it is otherwise invalid on other grounds. According to Mr. Gupta, if a person enters into a transaction in due compliance with the requirements of section 4(2), he cannot be hauled up for contravention of section 4(2) only because subsequently it transpires that transaction is found to be illegal or void for some other reason as for example if it is subsequently found that one of the parties to such a transaction being a minor could not have lawfully entered into a contract. Therefore, according to Mr. Gupta, the learned judge in the trial court went wrong in thinking that when on the other allegations levelled in the show cause memo contravention of section 28(3) of the Manual had been alleged such contravention would render the entire transaction void so that the conversion though made at an authorised rate would be in violation of section 4(2) of the Act because that rate would not avail because of invalidity of the contract on the other ground. He has strongly assailed the correctness of the view taken by the learned judge in the trial court.

11. Mr. Ray appearing on behalf of the appellant, Hindusthan

Motors has adopted the arguments of Mr. Gupta. Mr. Ray has further pointed out that section 28 of the Manual really constitutes a part of the instructions issued by the Reserve Bank under section 3(3) of the said Act and contravention of an instruction can never constitute the foundation for any adjudication contemplated by section 23D.

12. In contesting both the appeals, Mr. Chakrabarti appearing on behalf of the respondents has contended that section 4(2) of the said Act authorises contracts at ready rates only and if it is to be at forward rates it must necessarily be with the special or general permission of the Reserve Bank. In the present case, the impugned forward exchange contract having been entered into without any such permission from the Reserve Bank there has been a violation of section 4(2) of the said Act. Secondly, it has been contended by Mr. Chakrabarti that when section 4(2) speaks of a transaction it necessarily contemplates a valid transaction but where, as in the present case, the transaction is a forward exchange contract which had not been entered into in due compliance with the requirements of section 28(3) of the Manual, that transaction must be deemed to be invalid and void and therefore, conversion at the rate specified in such contract and not at the prevailing rate would constitute breach of section 4(2) of the said Act. Thirdly, it has been contended by Mr. Chakrabarti that even if the allegations constitute violation of any direction or instruction issued by the Reserve Bank under section 3(3) of the said Act, such violation can be the subject matter of adjudication by the adjudicating authority in view of the extended scope of such adjudication under the provisions of the new Foreign Exchange Control Act, 1973. Reference is made to section 51 of the new Act which corresponds to section 23D of the old Act of 1947 with this modification that under the new provision the authority to adjudicate is not limited to contravention as in the old Act. According to Mr. Chakravarti section 51 being procedural provision can have retrospective operation and can very well be availed of for adjudicating contraventions made prior thereto. Apart from the aforesaid three substantial objections raised by Mr. Chakrabarti he has raised a few technical objections. According to Mr. Chakrabarti in view of the inordinate delay incurred by the petitioners in moving this court and in view of their conduct of submitting to the jurisdiction of the adjudicating authority they should not be allowed to claim any relief from this court in the manner proposed. Next, according to Mr. Chakrabarti, Reserve Bank being a necessary party and not having been made a party to the present proceedings the writ petitions should not be entertained in the absence of the Reserve Bank. Lastly, it has been contended by Mr. Chakrabarti that since the petitioners have an alternative remedy under the Act, the writ petitions are not maintainable.

13. We have carefully considered the rival contentions raised

before us. In our view, the substantial issue which needs to be determined is as to whether the two show cause notices at all make out any case for adjudication under section 23D of the said Act. Under section 23D, the adjudicating authority has the jurisdiction to hold an enquiry for adjudging under the section 23(1)(a) whether any person has committed any contravention referred to in section 23(1) of the said Act. Section 23(1) speaks of contravention of sections 4, 5, 9, 10, 12(2), 17, 18A, 18B or of any rule, direction or order made thereunder. On the show cause notices on which the impugned adjudication proceedings had been initiated what is alleged to have been contravened by the appellant/petitioners is section 4(2) of the said Act and not any of the other provisions referred to in section 23(1). Section 4(2) provides as follows :

“Except with the previous general or special permission of the Reserve Bank, no person whether an authorised dealer or otherwise shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank.”

There is no dispute that Reserve Bank's authorisation of the rates for such conversion is to be found in paragraph 13 of section 1 of the Manual which is in following terms :

“Section 4(2) the Foreign Exchange Regulation Act, 1947, lays down that all transactions in foreign exchange shall be done at rates for the time being authorised by the Reserve Bank. In pursuance of the above provision, the Reserve Bank of India has authorised that (a) rates of exchange governing transactions in or relating to sterling shall be those published by the Foreign Exchange Dealers' Association of India :

(b) the rates in respect of other currencies may be fixed by authorised dealers on the basis of market conditions subject to spot transactions being done at or between the rates ruling in the London Foreign Exchange market and,

(c) the terms and conditions laid down by the Foreign Exchange Dealers' Association of India for transacting foreign exchange business shall govern all business transacted by authorised dealers.”

In the present case, the exchange being in relation to sterling was effected at the rate published by the Foreign Exchange Dealers' Association of India. There is no dispute that the Foreign Exchange Dealers' Association of India publishes from time to time different rates for different transactions. Such Association publishes one rate for immediate conversion called ready rate and another for conversion at any time within 6 following months and yet another rate for conversion at any time beyond 6 but within 12 following months called forward rates. It is also not in

dispute that on the day the said bank entered into the forward exchange contract with Hindusthan Motors agreeing to convert Indian currency into sterling at any time within 6 months following the date of the contract, it did so at the rate of Re. 1/- = 1.5/29/32, a rate published on that date by the Foreign Exchange Dealers' Association of India to be the rate for such forward exchange, and as such, authorised by the Reserve Bank. These facts not being in dispute and being apparent on the show cause notices the question is can it be said that the appellant/petitioners in the present case in entering into such a forward exchange contract agreeing to convert Indian currency into sterling at the forward rate so published by the Foreign Exchange Dealers' Association of India and subsequently having converted rupee into sterling at the rate so agreed, did commit any violation of section 4(2) of the said Act as alleged.

14. We have set out section 4(2) hereinbefore. In our view that provision enjoins that none shall enter into any transaction which provides for conversion of Indian currency into foreign currency or vice versa at rates of exchange other than the authorised rates. Such a prohibition in its turn, however, is subject to a proviso that one can enter into such a transaction if it is so done with previous general or special permission of the Reserve Bank. Therefore, in a case where the transaction provides for conversion at authorised rates there arises no necessity of obtaining permission in any manner from the Reserve Bank. We are, therefore, unable to accept the contention of Mr. Chakrabarti that in all cases where the transaction provides for conversion at a rate other than ready rate for immediate conversion, the transaction must be entered into only with the previous general or special permission of the Reserve Bank. In our view, Mr. Gupta is well justified in his criticism of the show cause notice to the effect that it is based on a fundamental misconception. On the said show cause notice the allegation made is that fulfilment of the conditions specified in section 28(3) of the Manual constitutes the foundation for the general approval by the Reserve Bank and when in the present case such conditions had not been fulfilled, there was no prior general permission of the Reserve Bank and when there was no special permission the transaction though made at the forward rate published by the Foreign Exchange Dealers' Association constitutes contravention of section 4(2). Such a position is not sustainable for the simple reason that the transaction being made at an authorised rate, obtaining prior permission from the Reserve Bank in any form is not called for and the absence of such permission does not render the transaction so made as being in contravention of section 4(3).

15. Assuming the substantive allegations made in the show cause notices to be all true, let us now consider whether they otherwise constitute violation of section 4(2) of the said Act. Such allegations are that the appellant/petitioners as between them entered into a

forward exchange contract without the said Bank fulfilling their obligations under section 28(3) of the Manual. The question to be considered is as to whether contravention of section 28(3) of the manual leads to or results in contravention of section 4(2) or any of the sections specified in section 23(1) of the said Act. Paragraph 3 of section 28 of the Manual provides that forward sales of foreign currencies may be made by authorised dealers without prior approval of the Reserve Bank against import of merchandise but such sales must be made in accordance with instructions set out in the other clause of that paragraph. The material clause provides that contracts for forward sales against imports may be entered into only if (a) the applicant holds a valid import licence with an exchange control copy covering the proposed import, or the import is covered by an open general licence and (b) either a letter of credit covering the proposed import has been opened or a firm order has been placed and accepted by the seller. On the show cause notices in the present case the allegation is that the said bank in entering into the forward contract with the other appellant/petitioner did not satisfy itself to the effect that either a letter of credit covering the proposed import had been opened or a firm order had been placed by Hindusthan Motors and accepted by their sellers. In other words, the allegation is that in entering into the forward contract there has been a contravention of paragraph 3 clause (ii) (b) of section 28 of the Manual. On a plain reading of section 4(2) of the said Act and section 23(3) of the Manual, it appears clear to us that the requirements prescribed by the instructions incorporated in section 28 are not the requirements of section 4(2). Section 4(2) speaks of authorisation of the rate of exchange and of a general or special permission in case of transactions providing conversion at a rate other than the rate so authorised. Section 28 of the Manual covers a different field altogether. We have already found that to the extent the show cause notices proceed on the basis that fulfilment of the requirements of section 28(3) of the Manual constitutes a general permission contemplated by section 4(2) is concerned, such notices are based on an erroneous idea about the legal position. Firstly, the question of general or special permission does not arise at all since the transaction itself provided for conversion at authorised rate. Secondly, section 28(3) itself does not specify that fulfilment of the requirements thereof constitutes any general permission of the Reserve Bank. Section 28 obviously was meant for other purposes and comes under either section 3(3) or section 20(3) of the said Act. Contravention of these provisions may constitute independent offences, resulting in independent liabilities but that does not constitute violation of section 4(2) of the said Act or any of the provisions specified in section 23(1) of the said Act which can authorise an adjudication under section 23D. (See (1) *Union of India v. Shreeram Durga*, AIR 1970 SC 1597). Therefore, we are of the opinion that even if there had been a violation of

section 28(3) in the matter of entering into the forward contract between the appellant/petitioners in the present case that does not amount to violation of section 4(2).

16. The only other issue that remains to be considered is as to whether because of such contravention of section 28(3) the forward contract itself must fail and the entire transaction must be construed to be so void that conversion of Indian currency into sterling on subsequent dates not being at the rate prevailing on the date of conversion but being at a rate as agreed between the parties on the basis of such a forward contract would constitute violation of section 4(2) of the said Act. The learned judge in the trial court appears to have taken the view that the forward contract itself becomes void, and as such, there could be no legal authority for the bank to effect the exchange at the rate so agreed and not at the rate prevailing on the date of conversion. According to the learned judge, the actual conversion, therefore, becomes one at a rate not authorised under section 4(2). The same is the contention of Mr. Chakrabarty in support of the show cause notices. We, however, unable to agree with the learned judge in the trial court on this point. Section 23(1) imposes a criminal liability when it provides that any person contravening section 4 shall not only be liable to such penalty as specified in clause (a) that may be adjudged by the Director of Enforcement, but shall, upon conviction by a court, be punishable with imprisonment for a term which may extend to 2 years or with fine or with both. Such a provision, in our view, must be strictly construed. When section 4(2) provides that no person shall enter into any transaction which provides for conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the authorised rate, none should contravene the prohibition imposed by this provision in the transactions they enter into. That prohibition only relates to the rate and is irrespective of the transaction being otherwise valid or invalid. In our view it is not permissible to impose collaterally a criminal liability under section 23(1) by pleading that the transaction itself being otherwise invalid though it provided for conversion at the authorised rate, such rate would not be of any avail and the transaction must be construed to be one not at the rate so agreed. In our view, the only point which arises for consideration on a charge of the present nature is to find out whether in entering into the transaction, otherwise valid or invalid, there had been any conversion at a rate other than the authorised rate so that only in a case where there is a conversion at a rate other than the authorised rate the person concerned may be charged for having contravened section 4(2) of the Act.

17. So far as we have considered the principal allegations made in the respective two show cause notices which are common to both. There are certain additional allegations against appellant Bank. It has been

alleged that the Bank in its turn made a forward purchase of (pound) 7,00,000 from the Reserve Bank and had that (pound) sterling released by the Reserve Bank on certain misrepresentations. In our view the prohibition under section 4(2) cannot, on its own terms, have any application to transactions with Reserve Bank in whom lies the entire control including the right to relax the very prohibition incorporated therein. Nor has it been alleged that in making such purchase the said bank had adopted any unauthorised rate of conversion. Therefore, by making the forward purchase from the Reserve Bank, the said bank cannot be said to have violated section 4(2) of the said Act nor is it so alleged in the show cause notice. The real grievance is, however, on the score that the said bank had such (pound) sterling released on misrepresentations made to the Reserve Bank. Such alleged misconduct on the part of the said bank however, does not constitute contravention of any of the provisions specified in section 23(1) and as such cannot be the subject matter of any adjudication under section 23D of the said Act.

18. Next we proceed to consider the third point raised by Mr. Chakrabarti. Relying on the provisions of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the "1973 Act"). Mr. Chakravarti contends that even if the allegation incorporated in the show cause notices make out infringement not of section 4(2) but of section 3(3) of the said Act (i.e., Act of 1947), such infringement can be adjudicated by the Director of Enforcement in view of the extension of field of adjudication by such a Director under the new Act. Obviously Mr. Chakravarti relies on section 51 of the 1973 Act which corresponds to section 23D of the said Act. Section 51 has undoubtedly extended the field of adjudication. Unlike section 23D, the right to adjudicate is no longer limited to the contravention of a few specified provisions of the Act but extends to cover contraventions of all the provisions of the Act barring only sections 13(a), 18(1) and 19(1) (a). To be more precise Director of Enforcement has been conferred the jurisdiction to adjudicate contravention of section 6(4) of the new Act which corresponds to section 3(3) of the said Act. Since the new Act has come into effect Mr. Chakravarti contends that section 51 merely providing for the procedure can be given retrospective effect, so that even if the contravention alleged in the show cause notices constitute contravention of section 3(3) that can now be adjudicated by the Director of Enforcement. It is difficult, however to accept this contention of Mr. Chakravarti. The new Act, that is, the 1973 Act is not an amending Act and does not propose to amend the old Act, so that it can be said to amend the procedural part with retrospective effect. It repeals the old Act subject to the savings under section 6 of the General Clauses Act and section 81 of the 1973 Act. Such saving provisions may save the liability incurred

by the appellant-petitioner and may save the right to initiate appropriate proceedings under the old Act for enforcement of such liabilities. Under section 81 the pending proceedings may as well be proceeded with as if initiated under the corresponding provisions of the new Act. But these saving provisions do not extend the jurisdiction of the Director of Enforcement to adjudicate any contravention of a provision of the old Act which was not capable of such adjudication by him. Section 51 of the 1973 Act provides that the adjudicating authority can hold an adjudication in respect of contravention of any of the provisions of this Act, that is, the 1973 Act. Here the appellant-petitioners cannot be said to have contravened any of the provisions of 1973 Act, because the Act was not there when the contravention alleged had been committed. An adjudication proceeding initiated under section 23D can no doubt be continued under section 51 in view of section 81, but that presupposes that such a proceeding was competently initiated under section 23D. A proceeding which could not have been initiated under section 23D cannot be continued under section 51. Moreover when in both the cases the only charge levelled against the appellants is contravention of section 4(2) of the 1947 Act and one of these proceeding too was initiated under section 23D, there is no scope for a contention of the nature put forward by Mr. Chakravarti.

19. So far as the other technical objections raised by Mr. Chakravarti are concerned, we find little substance in them. Though according to Mr. Chakravarti, the appellant-petitioners are guilty of inordinate delay in moving this Court, we do not find any real delay based on the appellants' laches. In the case of the bank the show cause notice is dated January 3, 1972. Cause being shown on February 16, 1974, the adjudicating authority made an order under Rule 3(3) of the Adjudication Proceedings and Appeal Rules on August 3, 1974 and the appellant bank moved this court immediately thereafter on August 19, 1974. In the other case the show cause notice was issued on April 3, 1974. Cause being shown on January 7, 1975, the order under Rule 3(3) as above was made on January 3, 1976 and this court was moved immediately thereafter on January 15, 1976. In either of these cases, the appellant-petitioners could not have moved this court without first raising the objection as to non-maintainability of the adjudication proceeding before the adjudicating authority under Rule 3(3). It is only when the adjudicating authority overruled their objection and expressed the opinion that the proceeding should be held that they could move this court. There was no delay in moving this court since after the adjudicating authority's order made under Rule 3(3). Some time may have lapsed between the issue of the show cause notice and the cause being shown but that was due to the inspection of voluminous documents prayed for and granted from time to time. Such time having been granted by the adjudicating authority,

• Mr. Chakravarti cannot now make a grievance over it. Moreover on our findings when the adjudication proceedings are wholly beyond the jurisdiction of the adjudicating authority, it would not be just and proper to allow such proceedings to continue only on the ground of delay. The next objection raised by Mr. Chakravarti is that the appellant-petitioners having submitted to the jurisdiction by filing defences to the show cause notices, they cannot any longer challenge the jurisdiction of the adjudicating authority. In our view such an objection should be overruled because when the adjudicating authority inherently lacks jurisdiction—the allegations not constituting any contravention of section 4(2)—no amount of consent could confer upon the said authority the necessary jurisdiction to hold such an adjudication. Moreover the appellants never submitted to the jurisdiction of the adjudicating authority which will be apparent on the causes shown by them. They specifically raised an objection to the maintainability of such an adjudication proceeding and in showing cause reserved their right to challenge the authority's jurisdiction to proceed with the proceeding. Under the adjudication proceedings and Appeal Rules, they were entitled if not obliged to raise such an objection at the first instance before the adjudicating authority and invite his decision thereon and by doing so they cannot be said to have submitted to the jurisdiction or that authority to hold the adjudication even if the same is otherwise without jurisdiction. Mr. Chakravarti's next objection is that in the absence of the Reserve Bank as a party to the present proceedings in this Court such proceedings are not maintainable. In our view Reserve Bank is not a necessary party. What have been challenged are the adjudication proceedings sought to be held by the adjudicating authority. Merely because the directions or the authorisation alleged to have been infringed are those issued by the Reserve Bank, the said Bank does not become a necessary party. Such direction or authorisation is not the subject matter of challenge. What is challenged is that the infringement alleged does not constitute contravention of section 4(2) of the said Act. Last objection raised by Mr. Chakravarti is that an alternative remedy bars the proceedings initiated in this court. But he has failed to show us any remedy for the relief claimed in the writ petition. The fact that the appellant-petitioners have a right of appeal against the final order that may be passed by the adjudicating authority, cannot in our view be considered to be an alternative remedy. The appellant-petitioners are challenging the maintainability of the proceedings on the ground that the adjudicating authority had no jurisdiction on the face of the show cause notices to initiate the adjudication proceedings. They raised that objection before the adjudicating authority under Rule 3(3) of the Adjudication Proceedings and Appeal Rules but the same was overruled. Law does not provide for any other remedy for annulling such a proceeding initiated without

jurisdiction. It is no remedy for them that they must now suffer the proceedings and raise the same issue once more in preferring an appeal against the final order that may be passed against them because the relief they claim is that they should not be made to suffer a proceeding in the hands of an authority patently having no jurisdiction to initiate or hold the same.

20. In the result, on our findings made hereinbefore, it must be held that the impugned adjudication proceedings are wholly beyond the jurisdiction of the adjudicating authority. Appeals, therefore, succeed and are allowed. The judgment and order as passed by the learned trial judge in both cases are set aside. The respective writ petitions are allowed and the two adjudication proceedings impugned in the two Rules are set aside. There will be no order for costs.

Chakrabarti, J. ; I agree.

N. C. S.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Rabindranath Bhattacharya and Mr. Justice

Monoj Kumar Mukherjee

Decision : June 23, 1978

Sm. Binapani Ray ... (Plff) Appellant

Versus

Sm. Jyotirmoyee Devi & Ors. ... (Defis) Respondents*

West Bengal Non-Agricultural Tenancy Act (20 of 1949) Sec. 7(3)—Incidents of tenancy—Non-Agricultural lease for life of lessee—Lessee in continuous occupation for more than 12 years—Such term in lease does not come within the expression 'tenancy for a term not less than 12 years'—Significance of the word 'term' used for second time in sub-sec. (3)—Interpretation of word 'term'.

One Sarala Bala took a lease of the disputed land from the predecessor-in-interest of the defendant-landlords. That Sarala Bala was a tenant was not in dispute. There is also no dispute that the said tenancy was governed by the West Bengal Non-Agricultural Tenancy Act. It is recorded in the Record of rights that the defendants-landlords were non-agricultural tenants and Sarala was a non-agricultural under-tenant as classified in section 3 of the Act. Admittedly again, the lease was for the life time of Sarala. After the death of Sarala Bala, her sole heir, Kishore claimed the suit property. Almost immediately after the death of Sarala, the property was sold to the plaintiff. Binapani Plaintiff filed the instant suit for declaration of her title to the suit property and for recovery of the same. Before the trial court, the plaintiff relied upon section 7(3)

*Appeal from Appellate Decree no. 570 of 1968.

of the West Bengal Non-Agricultural Tenancy Act in support of her right against eviction.

The only question for consideration in this appeal is whether in the lease in favour of Sarala there was any term specified because if no term is specified in her lease then Sarala or his successor may have some right against eviction.

HELD : The word "term" which is used for the second time in sub-section (3) of Section 7 of the Act, means an agreed period of time known to the parties concerned. In the present case the lease in question was for the life-time of the lessee, Sarala and both the lessor and the lessee accepted the said term. That being so, the plaintiff can have no right as claimed by her in the tenancy created in favour of Sarala, since deceased.

Case referred to :—

(1) *Indian Iron and Steel Co. Ltd. v. Biswanath Sunar*, AIR 1967 SC 77

Shyama Charan Mitter and Shyama Pada Roy Chowdhury ... for Appellant
P. N. Mitter, B. C. Roy Chowdhury and
Bhabani Prosun Chatterjee for the Respondents

The judgment of the Court was as follows :—

Bhattacharya, J. : This is a second appeal by the plaintiff, who brought a suit for recovery of possession of the disputed property on a declaration of his title therein and also for mesne profits. In the trial court the plaintiff succeeded but on appeal by the defendants in the first appellate court below, the decree in favour of the plaintiff was set aside and the suit was dismissed.

2. The relevant facts for the purpose of determination of this appeal may be stated in brief. One Sarala Bala Dasi took lease of the disputed land from the predecessor-in-interest of the defendant-landlords. The original lease was executed in favour of two persons, namely, Sarala and one Srikanta her paramour. Srikanta was a name-lender. It is admitted by both the parties that in fact Sarala was the tenant. There is no dispute also that the tenancy was for non-agricultural purpose and that the tenancy was governed by the West Bengal Non-Agricultural Tenancy Act. From the khatians it also appears that the defendant-landlords are also recorded as non-agricultural tenants. There is no doubt, therefore, that the defendants-landlords were the non-agricultural tenants and Sarala was the non-agricultural under-tenant as classified in section 3 of the West Bengal Non-Agricultural Tenancy Act. Admittedly again, the lease was for a period till the death of Sarala i.e. to say, for the life-time of Sarala. Sarala died and one Kishore Sardar, the brother of Sarala was the sole heir and, as such he claimed the suit property. Almost immediately after the death of Sarala, the property was sold to the present plaintiff Binapani Roy. The allegation of the plaintiff is that she got possession but the defendant-landlords by force ousted her and took khas possession

of the property in suit. She, therefore, brought a suit for recovery of khas possession, for declaration of her title in the suit property and for meane profits. The plaintiff claimed non-agricultural tenancy right in the suit property under the defendant-landlords.

3. Before the trial court the plaintiff relied upon Sub-section (3) of Section 7 of the West Bengal Non-Agricultural Tenancy Act for her right against eviction. Under sub section (3) of Section 7 of the Act, if any non-agricultural land has been held for a term of not less than 12 years under a lease in writing but no term is specified in such lease then the tenant shall get certain rights against eviction. At this stage, however, we are not concerned to see the nature of right. In the present case, admittedly, there is one lease in writing and according to the term of the lease Sarala was to enjoy the lease during the period of her life-time. There is no doubt also that for more than 12 years she was a tenant. Now the question that fell for determination before the courts below was whether in that lease there was any term specified. That is important because if no term is specified, then Sarala or his successor may have some right against eviction. According to the trial court, there was no "term" in which was specified in the lease. According to him the "term" to be specified must be in terms of year, months, days, etc. In the lease as it was stated that it was for the life-time of Sarala. According to the trial court there was no knowing as to how many years she would live or for how many months/and, therefore, there was no "term" specified. In this view of the matter, the trial court held that with the death of Sarala the lease did not expire and consequently the plaintiff having purchased the land from the heir of Sarala was entitled to get back the suit lands on the declaration that the plaintiff was a tenant. The learned Additional District Judge who disposed of the appeal, however, was of different view on the meaning of "term" appearing in the last portion of Sub-section (3) of Section 7. According to the learned Judge, the word "term" appearing for the second time in sub-section (3) of Section 7 does not necessarily mean a specified period expressed in days, months or years, but it means a period during which the lease is to subsist, that is to say, a definite period which can be understood by the parties. In the present case when it was stated in the lease that it was granted for the life time of Sarala, there was the 'term' specified meaning that the lease would be subsisting during the life-time of Sarala, which was not indefinite. In this view, it was held by the Appellate Court below that Sarala's heir or successor or the plaintiff would not have any right in the tenancy as alleged due to the provision of Section 7(3) of the West Bengal Non-Agricultural Tenancy Act.

4. Mr. S.C. Mitter appearing on behalf of the appellant contended that mere statement that the lease is for the life time of the lessee is no

“term” specified as mentioned in sub-section (3) of section 7. He has contended that in the first portion of sub-section (3) there is a reference to a “term of not less than 12 years” and therefore the word “term” appearing for the second time in the same sub-section would naturally mean “a term” with reference to years as mentioned in the first part of the sub-section. Mr. P.N. Mitter, appearing on behalf of the respondents has, however, opposed this contention as put forward from the side of the appellant. His contention is that the word “term” used for the second time in sub-section (3) must be definite which means specified and when it is stated that the lease is for the life time of Sarala it was quite explicit and the parties knew that the lease would be subsisting so long as the lessee would be alive and as such the “term” was not indefinite because it was clearly specified and known to both the parties. In support of his contention, Mr. P. N. Mitter has referred to a case (1) *Indian Iron and Steel Co. Ltd. v. Biswanath Sonar*, reported in AIR 1967 SC page 77. This case went upto the Supreme Court from this High Court and it relates to the provisions of the West Bengal Non-Agricultural Tenancy Act. During the argument, the construction of the words “no term is specified as appearing in sub-section (3) of section 7 came up for consideration. The construction made by the Supreme Court goes in favour of the respondents before us. We quote below the relevant portion of the judgment :

“A bare perusal of these enactments is sufficient to show that the word “term” used for the first time in (3) indicates that the period of occupation must not be less than 12 years. It cannot mean an agreed period because the latter part says that this applies where “no term” is specified in the lease and in this part the word “term” must obviously mean an agreed period”

We, therefore, find that the question raised by Mr. S C. Mitter on behalf of the appellant has already been answered by the Supreme Court as quoted above. The “term” used for the second time in sub-section (3) of Section 7, therefore, means an agreed period of time known to the parties concerned. In the present case the lease was for the life time of the lessee Sarala and both the lessor and the lessee accepted the term. It was an agreed term no doubt and specified and, therefore, in view of the interpretation given by the Supreme Court the plaintiff can have no right as claimed by her in the tenancy created in favour of Sarala, now deceased. We find no merit in this appeal.

5. The appeal is, therefore, dismissed but without costs in the facts and circumstances of this case.

Mukherjee, J. : I agree.

P. R.

[SPECIAL JURISDICTION (WEALTH TAX)]

Before Mr. Justice Dipak Kumar Sen and Mr. Justice Chandan
Kumar Banerjee

Decision : April 6, 1978

Commissioner of Income Tax, West Bengal-III ..

... Applicant

Versus

Bejoy Kumar Karnani & Ors.

... Respondents*

The assessee held a number of shares in Karnani Properties Ltd, and Karnani Investment Pvt. Ltd. The Wealth Tax Officer following an order of the Tribunal in the Wealth Tax assessment of Bejoy Kumar Karnani (individual) estimated the value of these shares by the method known as "break up value" method. The shares of Karnani properties Ltd. were accordingly valued at Rs. 6/- per share for the assessment year 1957-58 and the other assessment years i. e. 1959-60, 1960-61 and 1961-62. The shares of Karnani Investment Pvt. Ltd. had to be valued for the assessment years 1959-60, 1960-61 and 1961-62. Again following the "break up value" method, the Wealth Tax Officer estimated the value of these shares at Rs. 12/- per share for the assessment years 1959-60 and 1960-61 and at Rs. 10.83 for the assessment years 1961-62. In appeals preferred by the assessee, objecting to the valuation estimated as aforesaid, the Appellate Asstt. Commissioner upheld the valuation as made by the Wealth Tax Officer. The assessee went up to the Income Tax Appellate Tribunal on further appeals. The Tribunal accepted the principle that unquoted shares of an investment company should be valued primarily on the basis of its dividend earning capacity.

On a reference at the instance of the Commissioner—

HELD : The break up method is to be followed only in exceptional circumstances e. g. where the company is ripe for liquidation ; not that the said method is to be applied to a particular type of company e. g. investment company. Generally, asset-backing in an investment company is no doubt an important factor, but it is only important for the purpose of determining if an investment company by reason of its assets can be expected to yield consistent returns on the capital invested and not for the purpose of valuation of the shares of the company by taking the break up value of the assets.

Case referred to :—

- (1) *Commissioner of Wealth Tax, Assam v. Mahadeo Jalan & Ors.*,
86 ITR 621.

B. L. Pal and Ajit Sengupta

...

... for the Applicant

R. N. Bajoria and Dilip Kumar Dhar

...

... for the Respondents

The judgment of the Court was as follows :—

Sen, J. : The facts found and/or admitted in this Reference at the instance of the Commissioner of Wealth Tax, West Bengal III, are

*Wealth-tax Matter no. 377 of 1969.

• shortly as follows. Messers. Bejoy Kumar Karnani & Others, the assessee, a Hindu Undivided family, was assessed to wealth tax for the assessment years 1957-58 to 1961-62, the relevant valuation dates being 31st March of each of the years from 1957 to 1961.

2. At the relevant period the assessee held a number of shares in Karnani Properties Ltd. and Karnani Investment Pvt. Ltd. The Wealth Tax Officer following an order of the Tribunal in the Wealth Tax assessment of Bejoy Kumar Karnani (individual) estimated the value of these shares by the method known as "break up value" method. The shares of Karnani Properties Ltd. were accordingly valued at Rs. 6/- per share for the assessment years 1957-58 and 1958-59 and at Rs. 6.23, Rs. 6.18 and Rs. 6.18 respectively for the other assessment years i. e. 1959-60, 1960-61 and 1961-62.

3. The shares of Karnani Investment Pvt. Ltd. had to be valued for the assessment years 1959-60, 1960-61 and 1961-62. Again following the "break up value" method, the Wealth-tax Officer estimated the value of these shares at Rs. 12/- per share for the assessment years 1959-60 and 1960-61 and at Rs. 10.83 for the assessment years 1961-62.

4. In appeals preferred by the assessee, objecting to the valuation estimated as aforesaid, the Appellate Assistant Commissioner upheld the valuation as made by the Wealth Tax Officer.

5. The assessee went up to the Income Tax Appellate Tribunal on further appeals. Following, *inter alia*, an earlier order in the case of Balbhadradass Bangur in Wealth Tax Appeals Nos. 1199 to 1202 and nos. 1231 to 1234 all of 1964-65, the Tribunal accepted the principle that unquoted shares of an investment company, should be valued primarily on the basis of its dividend earning capacity.

6. In estimating the value of the shares of Karnani Properties Ltd. the Tribunal first considered the value of the quoted shares of other property holding companies and in particular those of Hindusthan Building Society Ltd. and Messrs. Sahu Properties Ltd. for the purposes of comparison. It was found that by reason of the rate of dividend declared, the quoted market value of the shares in the said companies were at all material times lower than their break up value. In two years when no dividend was declared, the shares of the Hindusthan Building Society Ltd. were quoted at 50% and 40% of their par value.

7. The Tribunal next considered the profit yielding capacity of Karnani Properties Ltd. Ignoring the commission and allowances paid to the Managing Director the Tribunal computed the average net profits after payment of taxes to be Rs. 92,000/- Rs. 72,000/-, Rs. 50,000/-, Rs. 43,000/- and Rs. 8,000/- respectively for the assessment years 1957-58 to 1961-62. Accordingly, the net earning from the shares of this company was held to be about 3%. The Tribunal took into account that the rental

income of the said company was affected by reasons of the existence of a number of old tenants in the properties. The Tribunal also took into account that the value of the land belonging to the company had appreciated though was not reflected in its balance sheet. The Tribunal held that the shares of this company was more valuable than an ordinary share, yielding return of only 3%, and accordingly, valued the same at 50% of par value i.e. Rs. 2.50 per share.

8. In valuing the shares of Karnani Investment Pvt. Ltd., which was incorporated in 1958, the Tribunal noted that in the year ending the 31st March 1959, after providing for Director's remuneration of Rs. 11,250/- and writing off preliminary expenses of Rs. 1797/- there was a net book loss of Rs. 2043/-. By adding back the said amounts of remuneration and expenses, the Tribunal computed the real profits of the company to be Rs. 11,000/-. A comparable figure was estimated for the year ended 31st March 1960 and for the year ended 31st March 1961, real profit was estimated on a similar basis at slightly over Rs. 10,000/-. The Tribunal held that though profits were low by taking into account the future prospects of this newly floated company, the value of its shares should be estimated at 50%- of the per value i.e. Rs. 5/- per share.

9. At the instance of the Commissioner of Wealth Tax, West Bengal III, Calcutta, the following question had been referred under section 27(1) of the Wealth Tax Act, 1957 as a question of law arising from the order of the Tribunal.

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that for the purpose of section 7(1) of the Wealth Tax Act, 1957, the value of unquoted shares of (1) Karnani Properties Ltd. and (2) Karnani Investments Private Ltd. as on the relevant valuation dates, should be determined on the basis of the average earning capacity of the shares?"

10. At the hearing, Mr. B. L. Pal, learned counsel for the Revenue, has drawn our attention to a decision of the Supreme Court in (1) *Commissioner of Wealth Tax Assam v. Mahadeo Jalan & Ors*, reported in 86 ITR 621 for the following observations in the judgment-

P.628—"Leaving aside any distress sales, the factors which in our view are likely to determine the fixation of a share on any particular day or at any particular time is, firstly, the profit earning capacity of the company on a reasonable commercial basis; secondly, its capacity to maintain those profits or a reasonable return for the capital invested and in special cases such as investment companies, the asset-backings, the prospects of capitalisation of its earning in the shape of declaration of bonus shares or where the company is financially and commercially sound, the prospects of issue of further capital where the existing share-holders have a right to apply for and obtain them at a certain price which is generally less than the market value, offering an

- increased yield on his investment, on the assumption that the company will be able to maintain the same rate or at least increase the aggregate
- payment of dividend on the increased capital."

P, 634. "The yield method is the generally applicable method while the break-up method is the one resorted to in exceptional circumstances or where the company is ripe for liquidation but none the less is one of the methods."

11. Mr. Pal also drew our attention to a chart printed in the paper book at pp.84-85. From the figures entered in this chart. Mr. Pal contended that Karnani Properties Ltd. had no yielding capacity whatsoever from the years 1958-59 to 1961-62.

12. On the basis of the above Mr. Pal submitted that the shares in the instant case, belong to investment companies, one of which had no yield whatsoever at the relevant time therefore, fell within the category of special cases, and/or came within the exceptional circumstances and the break up method had to be adopted for their valuation.

13. Mr. R.N. Bajoria, learned counsel for the assessee, has contended on the other hand, that the judgment of the Supreme Court, in *Mahadeo Jalan's* case (supra) if read in its entirety supported the case of the assessee and not that of the Revenue.

14. On the passage at page 628 of the report of the said judgment cited by Mr. Pal, Mr. Bajoria submitted that the Supreme Court had laid down therein the various factors which were likely to determine the value of a share of company at any particular time. The main factors were, first, the profit earning capacity of the company and second, the company's capacity to maintain such profits in future. It is only in determining the capacity of a company to maintain its profits and thus secure a reasonable return for capital invested, that the asset-backings of an investment company had to be looked into. He submitted that it was not laid down by the Supreme Court that in valuing the shares of an investment company, the profit earning capacity of the company should be ignored entirely and break up method followed.

15. In support of this contentions Mr. Bajoria drew our attention to further observations of the Supreme Court in the same decision as follows :

(Page 629). "From what we have stated, among the factors which govern the consideration of the buyer and the seller where the one desires to purchase and the other wishes to sell, the factor or break up value of a share as on liquidation hardly enters into consideration where the shares are of going concern. The basic yield method in cases where shares are quoted and transactions take place on the share market may not be different but where shares are not quoted, it is in these latter cases the yield must be determined after taking into account various factors as to which a reference has been made earlier."

(page 630). But where a person holds shares in a company which is making losses and where it does not justify a declaration of dividends even from reserves as a temporary boost or where there is a possibility of its capital structure being affected or if that state of depression continues, in other words, the company is ripe for liquidation, the valuation may well be the break-up value of the shares.

(pages 633-634). "An examination of the various aspects of valuation of shares in a limited company would lead us to the following conclusions :

(1) Where the shares in a public limited company are quoted on the stock exchange and there are dealings in them, the price prevailing on the valuation date is the value of the shares.

(2) Where the shares are of a public limited company which are not quoted on a stock exchange or of a private limited company the value is determined by reference to the dividends if any, reflecting the profit-earning capacity on a reasonable commercial basis. But, where they do not, then the amount of yield on that basis will determine the value of the shares. In other words, the profits which the company has been making and should be making will ordinarily determine the value. The dividend and earning method or yield method are not mutually exclusive; both should help in ascertaining the profit earning capacity as indicated above. If the results of the two methods differ, an intermediate figure may have to be computed by adjustment of unreasonable expenses and adopting a reasonable proportion of profits.

(3) In the case of a private limited company also where the expenses are incurred out of all proportions of the commercial venture, they will be added back to the profits of the company in computing the yield. In such companies the restriction on share transfers will also be taken into consideration as earlier indicated in arriving at a valuation.

(4) Where the dividend yield and earning method break down by reason of the company's inability to earn profits and declare dividends if the set back is temporary then it is perhaps possible to take the estimate of the value of the shares before set-back and discount it by a percentage corresponding to the proportionate fall in the price of quoted shares of companies which have suffered similar reverses.

(5) Where the company is ripe for winding up then the break up value method determines what would be realised by that process.

(6) As in *Attorney General of Ceylon v. Mackie* a valuation by reference to the assets would be justified whereas in that case the function of profits and uncertainty of the conditions at the date of the valuation prevented any reasonable estimation of prospective profits and dividends.

In setting out the above principles, we have not tried to lay down any hard and fast rule because ultimately the facts and circumstances of each case, the nature of the business, the prospects of profitability and such other considerations will have to be taken into account as will be applicable to the facts of each case. But, one thing is clear, the market value unless in exceptional circumstances, to which we have referred, cannot be determined on the hypothesis that because in a private limited company one holder can bring it into liquidation it should be valued as on liquidation by the break-up method. The yield method is the generally applicable method while the break-up method is the one resorted to in exceptional circumstances or where the company is ripe for liquidation but none the less is one of the methods."

16. The submissions of Mr. Bajoria are not without substance. From the observation of the Supreme Court it appears to us that the break up method is to be followed only in exceptional circumstances e.g. where the company is ripe for liquidation not that the said method is to be applied to a particular type of company e.g. an investment company. Generally, Asset-backing in an investment company is no doubt an important factor, but it is only important for the purpose of determining if an investment company, by reason of its assets can be expected to yield consistent returns on the capital invested and not for the purpose of valuation of the shares of the company by taking the break up value of the assets.

17. It is *nobody's* case that the companies in question were ripe for liquidation at the relevant time or that they were in such a condition that there would be little or no expectation of yield from or earning by them in future.

18. The Tribunal has specifically computed the real profits earned by the said two companies. These findings are not challenged. The Tribunal has nowhere referred to the chart printed in the paper book relied on by Mr. Pal. It is not known who has prepared this chart or if the figures therein are correct, *Ex. facie*, the percentage of yielding capacity has been calculated in the chart on the basis of average annual net profit and not on actual profits. For the said reasons the purported chart is of little significance in this reference.

19. We find that in arriving at the value of the shares the Tribunal has taken into account all relevant factors as specified by the Supreme Court viz. the yield, the assets the potentiality and also the quoted value of shares in similar companies. Such valuation in our opinion is not in any way erroneous.

20. For the reasons stated above, we answer the question in the affirmative and in favour of the assessee. In the facts and circumstances of this case there will be no order as to costs.

Banerji, J. : I agree.

A. S. G.

— — — —

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Murari Mohan Dutt and Mr. Justice Dhiresh
Chandra Chakravorti

Decision : June 16, 1978

Shiba Prosanna Banerjee

...

.. Petitioner

Versus

Mrityunjoy Khan & Ors.

...

... Opposite parties*

West Bengal Non-Agricultural Tenancy Act (20 of 1949), Sec. 24—
Pre-emption — Partition of a tenancy by co-sharers without consent of land-
lord—One plot (A) allotted exclusively to some co-sharers and another plot
(B) kept joint—Plot A sold to stranger—Application for pre-emption by a
co-sharer who had no knowledge of such partition—Partition and allotment
of shares amongst co-sharers without consent of landlord—Allotment of a
plot exclusively to a co-sharer by such partition—Other co-sharers remain
as such for purposes of exercise of right of pre-emption.

There was a partition of a particular tenancy amongst its co-sharers.
Upon such a partition, Plot 1768 was exclusively allotted to opposite parties
2 and 3 in C. R. no. 2049/73 while Plot 1767 was kept joint by the co-
sharers. There is no evidence that such partition was consented to by the
landlord. Thereafter O. P. nos. 2 and 3 transferred their interests in Plots
1768 and 1767 to Mrityunjoy. O. P. no. 1, a stranger, without serving,
any notice upon Shiba Prosanna, a co-sharer, of such transfer to Mrityunj-
joy. When Shiba Prosanna came to know of such transfer he made an
application for pre-emption under section 24 of the W. B. Non-Agricul-
tural Act 1949 in the Court of the Subordinate Judge, Burdwan. This
application was resisted by Mrityunjoy. The application was allowed by
that Subordinate Judge and on appeal by Mrityunjoy, the Addl. District
Judge allowed the appeal in part. The appellate court below took the
view that as by the partition, Plot 1768 was allotted exclusively to O.P.
2 and 3, Shiba Prosanna ceased to be a co-sharer in respect of that plot
and accordingly, his application so far as that plot is concerned was not
maintainable. It was however held that in regard to Plot no. 1767 Shiba
Prosanna was a co-sharer and he could claim pre-emption in respect of
that plot. Being aggrieved, both Shiba Prosanna and Mrityunjoy moved
this court in revision and obtained two Rules.

HELD : So long as the holding is not split up by partition amongst
the co-sharer-tenants with the consent of the landlord, each co-sharer con-
tinues to be a tenant under the same landlord and is entitled to make an
application for pre-emption on the principle as laid down in *Abinash Chandra
Jana's case* (55 CWN 717)

Cases referred to :—

(1) *Debendra Nath Sen v. Ganendra Nath Bera*, 53 CWN 107

(2) *Goas Ali Bhuniya and Others v. Lal Mia and others*, 52 CWN 90

*C. R. no. 2049 of 1973 and 2827 of 1973.

- (3) *Abinash Chandra Jana and others v. Chakradhar Khatua and Ors*, 55 CWN 717

- (4) *Uma Shankar Nayak Saha v. Usharani Laha*, ILR (1968) 2 Cal 587

M. N. Ghose, Sourendra Prosad Ghose and J. M. De ... for the petitioner in C. R. no 2827/73 and for the Oppo. party in C. R. no. 2049 of 1973
Sudhis Dasgupta and Tapas Bandhopadhyay .. for the Appellant in C.R. no. 2049/73 and for the Oppo. party in C. R. no. 2827 of 1973

The judgment of the court was as follows :—

Dutt, J. : The only question that is involved in these Rules is, whether on the partition of the land comprised in the tenancy of non-agricultural tenants without the knowledge and consent of the landlord, such tenancy is split up and the tenants ceased to be co-sharers.

2. On December 3, 1961, there was a partition between the co-sharer-tenants of the tenancy in question. Upon such partition, plot no. 1768, of Khatian no. 618, of Mouza Radhanagar, was exclusively allotted to the opposite parties nos. 2 and 3, Saralabala and Susama, in Civil Rule No. 2049 of 1973. Plot no. 1767 was, however, kept joint between the co-sharers. There is no evidence that such partition was consented to by the landlord. On October 24, 1965, Saralabala and Susama transferred their interest in Plots nos. 1768 and 1767 to the opposite party no. 1, Mrityunjoy Khan, a stranger, without serving any notice on Shiba Prasanna of such transfer. After Shiba Prasanna had come to know of the transfer, on April 10, 1968 he made an application for pre-emption under section 24 of the W. B. Non-Agricultural Tenancy Act, 1949 in the court of the Subordinate Judge, Burdwan. The application was resisted by Mrityunjoy, the transferee. His contention was that by the said partition Shiba Prasanna ceased to be a co-sharer and, as such, the application for pre-emption was not maintainable. The learned Subordinate Judge overruled the said contention and allowed the application for pre-emption.

3. Being aggrieved by the order of the learned Subordinate Judge allowing the application for pre-emption, Mrityunjoy preferred an appeal which was heard by the learned Additional District Judge, Second Court, Burdwan. The learned Additional District Judge took the view that as by the partition Plot no. 1768 was allotted exclusively to Saralabala and Susama, Shiba Prasanna ceased to be a co-sharer in respect of that plot and accordingly, his application for pre-emption was not maintainable so far as that plot was concerned. It was, however, held that in regard to Plot no. 1767, Shiba Prasanna was a co-sharer and he could claim pre-emption in respect of that plot. In that view of the matter, the learned Additional District Judge set aside the order of the learned Subordinate Judge in so far as Plot no. 1768 was concerned, but affirmed the same in regard to Plot no. 1767. Being aggrieved by the said order

of the learned Additional District Judge, both Shiba Prasanna and Mrityunjay moved this Court under section 115 of the Code of Civil Procedure and obtained these two Rules.

4. It has been already noticed that there is no material on record to show that the landlord consented to the partition effected between the co-sharers by a registered deed dated December 3, 1960. On the other hand, the relevant Khatians to which Plots nos. 1767 and 1768 appertain show that the tenancy is still joint between the co-sharers. Mr. Manindra Nath Ghose, learned Advocate appearing on behalf of the transferee also does not contend that the partition had been effected with the consent of the landlord. In these circumstances, we shall proceed on the basis that the partition was effected without the consent of the landlord.

5. The question came up for consideration before this Court in connection with the exercise of the right of pre-emption under section 26F of the Bengal Tenancy Act which is somewhat similar to section 24 of the West Bengal Non-Agricultural Tenancy Act. In (1) *Debendra Nath Sen v. Ganendra Nath Bera*, 53 CWN 107, G. N. Das, J. took the view that a partition among co-tenants is binding on the co-tenants who joined in the partition and was effective against the whole world except the landlord. In that case also, the partition was effected without the consent of the landlord. It was, however, held that in view of the partition an application for pre-emption was not maintainable. Mr. Ghose has placed strong reliance on this decision and also on a Bench decision of this Court in (2) *Goas Ali Bhuiya and others v. Lal Mia and others*, 52 CWN 90 in which Chakravarti, J. (as he then was), who delivered the judgment of the Bench, while considering the scope of section 26F observed as follows :

“In view of the scope of the section, it appears to us that by the terms “co-sharer in the tenancy” and “co-sharer tenant” the legislature meant persons who could claim to be regarded as co-sharers against the tenants.”

The said observation of Chakravarti, J. was relied on by G. N. Das, J. in *Debendra Nath Sen's* case referred to above. A later Division Bench of this Court in (3) *Abinash Chandra Jana and others v. Chakradhar Khatue and others*, 55 CWN 717, dissented from the view expressed by G. N. Das, J. and overruled the decision in *Debendra Nath Sen's* case.

6. We have been pressed hard by Mr. Ghose to disagree with the view of the Division Bench as expressed in *Abinash Chandra Jana's* case (Supra). Further, Mr. Ghose submits that the principle of law as laid down by G. N. Das, J. and Chakravarti, J. should be adopted by us in preference to that laid down in *Abinash Chandra Jana's* case.

7. In *Goas Ali Bhuiya's* case (supra), the question that came up for consideration was, whether a purchaser of a share of a co-sharer in the

tenancy who was never recognised by the landlord could acquire the status of a co-sharer tenant and make an application for pre-emption under section 26F of the Bengal Tenancy Act. Chakravarti, J. took the view that such an unrecognised purchaser was a co-sharer as against the tenants of the holding and was entitled to make an application for pre-emption under section 26F. It was, however, expressly laid down by Chakravarti, J. that such an unrecognised purchaser had no status of a tenant so far as the landlord was concerned and any payment that would be made by him to the landlord would not be rent but damages for use and occupation. The unrecognised transferee of a share of a non-transferable occupancy holding could not be said to be a tenant, but he was a trespasser *vis-a-vis* the landlord. With the greatest respect, we are unable to reconcile how an unrecognised transferee who does not become a tenant of the non-transferable occupancy holding under the landlord can become a co-sharer tenant of the holding. Be that as it may, in *Goas Ali Bhuiya's* case there was no question of partition of the tenancy. It is not disputed that where there is a partition between co-sharers of a tenancy without the consent of the landlord, such partition is not binding upon the landlord and such co-sharer remains liable to pay rent to the landlord. In other words, such co-sharer continues to be tenant of the holding. If according to Chakravarti, J. an unrecognised transferee of a share in an occupancy holding acquires the status of a co-sharer tenant and becomes entitled to make an application for pre-emption, a co-sharer who remains a tenant even after the partition of the holding will also be entitled to make an application for pre-emption. In our view, so long as the holding is not split up by the partition amongst the co-sharer tenants with the consent of the landlord, each co-sharer continues to be a tenant under the same landlord and is entitled to make an application for pre-emption as laid down in *Abinash Chandra Jana's* case (supra).

8. In this connection, we may refer to a decision of the Division Bench of this Court presided over by P. N. Mookerjee, J. in (4) *Uma Shankar Nayak Saha v. Usharani Laha*, ILR (1968) 2 Cal. 587. In that case, it has been held that unless the tenancy is split up with the consent of the landlord to form separate tenancies, section 94 of the West Bengal Non-Agricultural Tenancy Act applies, and that mere mutual partition amongst the tenants does not make the partitioned land subject-matter of different tenancies so as to come out of the mischief of section 24. A similar view has been taken in the case of (5) *Motilal Ghosh v. Bimal Chandra Saha and others* by Bachawat and A. C. Sen, JJ. in Civil Revision Case No. 41 of 1961 disposed of on April 19, 1963. We, accordingly, overrule the said contention of Mr. Ghose.

9. So far as Plot no. 1767 is concerned, there is no difficulty, for the said plot has been kept joint between the co-sharers and therefore

Shiba Prasanna is undoubtedly a co-sharer tenant in regard to that plot and is entitled to make an application for pre-emption. Mr. Ghose submits that after the West Bengal Estates Acquisition Act, 1953 had come into force, the interest of each co-sharer tenant had vested in the State and each had become a direct tenant under the State of West Bengal having a separate tenancy. This contention is without any substance. As the tenancy is admittedly a non-agricultural tenancy, there was no question of vesting of the interests of the tenants. This contention of Mr. Ghose therefore fails.

10. For the reasons aforesaid, we set aside the order of the learned Additional District Judge in so far as he held that Shiba Prasanna was not entitled to make an application for pre-emption in respect of plot no. 1768. We hold that the application for pre-emption of Shiba Prasanna was maintainable in respect of both the Plots nos. 1767 and 1768. The order of the learned Subordinate Judge allowing the application for pre-emption is affirmed. Civil Rule No. 2049 of 1973 is made absolute and Civil Rule No. 2827 of 1973 is discharged. There will, however, be no order for costs in either of the said Civil Rules.

Chakravarti, J. : I agree.

S.P.M.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee and Mr. Justice

Bankim Chandra Ray

Decision : July 19, 1978

Corporation of Calcutta ... Appellant

Versus

Arun Kumar Sen & Ors. ... Respondents*

Calcutta Municipal Act (W. B. Act 33 of 1951), Sec. 80—Authority empowered to make appointments—Appointment against permanent post—Such appointment made by resolution of Standing Finance Committee—Manner of such appointments and procedure to be followed are prescribed in Calcutta Corporation Service Regulations—Regulations 10 & 11—Order of discharge of a probationer—Whether Commissioner is competent to discharge a probationer like writ petitioner—“Appointing authority” under Sec. 80, meaning of. Bengal General Clauses Act (1 of 1899), Sec. 17—Power to appoint includes power to suspend or dismiss—Whether sec. 17 can be attracted in case of discharge—Interpretation.

A Municipal Pleader is in distress. Respondent no. 1 was initially appointed to officiate temporarily as a Municipal Pleader, Corporation of Calcutta pending filling up of such posts permanently. On 10.3.62 he

*Appeal from Original Order No. 232 of 1978.

joined in the post. Thereafter the municipal authorities issued advertisements inviting applications for filling up the permanent vacancies in the posts of Municipal Pleaders. Respondent no. 1 along with several others applied pursuant to such advertisement. The Standing Finance Committee of the Corporation of Calcutta at its meeting held on 16.9.63 resolved that the Respondent no. 1 and two others were appointed permanently to the three posts of Municipal Pleaders. Thereafter the Corporation appointed Respondent no. 1 as a Municipal Pleader on probation in compliance with Regulation 10 of the Service Regulations of the Corporation. Thereafter, on 4.11.63, Respondent no. 1 had joined in the said post. On 2.4.65 his probation period was extended by another year. By a letter dated 5.7.65 issued by the Chief Law Officer of the Corporation, Respondent no. 1 was informed that he had been discharged from service by an order of the Commissioner. Being aggrieved Respondent no. 1 moved a writ petition and obtained a Rule which was ultimately made absolute. The Corporation thereafter preferred this Letters Patent appeal.

HELD ; Respondent no. 1 was not dismissed from service but he was discharged during his probationary period. The principal question involved in this appeal is whether the expression, "Appointing Authority" in Regulation 11 of the Calcutta Corporation Service Regulations means the authority who appointed Respondent no. 1 or it means the authority now competent to make appointments to the posts of Municipal Pleaders. It appears that Respondent no. 1 was appointed as a probationer subject to the provisions of the Service Regulations including Regulations 10 and 11. His discharge order under Regulation 11(b) did not amount to punishment. Regulations 10 and 11 are incidental or consequential to the power of appointment conferred by section 80 of the Calcutta Municipal Act, 1951. These Regulations also qualify the powers of the authority empowered to make appointments under section 80 of the Act. The Authority so empowered under section 80 is required to put on probation, any one who is substantively appointed to a permanent post. Regulations 10 and 11 lay down the manner in which the authority competent to make appointments under section 80 shall fill up the permanent posts. Initially, the appointee to a substantive post would be put on probation by the authority specified in Section 80. If the appointing authority is satisfied, he would confirm the probationer in his post. On the other hand, if the authority is not satisfied, he would discharge the probationer. That being so, the 'appointing authority' in Regulations 10 and 11 should not be interpreted in the light of the provisions of section 87 of the Act. Section 87 has explicitly laid down that the authority by whom an officer or servant is appointed may punish such officer or servant. It would not be correct to hold that the expression "Appointing Authority" is an abbreviation of the words, 'the authority who had appointed the probationer'. If this meaning is adopted, it might result in inconsistencies. In the

instant case, after Respondent no. 1 was placed on probation in terms of a resolution of the Standing Finance Committee. Section 80 of the Act was amended. Under the amended section 80, the Commissioner and not the Corporation of Calcutta became empowered to make appointments to the post held by Respondent no. 1. Therefore the Corporation under Regulation 11 (a) could no longer confirm and substantively appoint Respondent no. 1. The authority who was empowered under section 80 alone possessed the power either to confirm a probationer or discharge him respectively in terms of clause (a) or (b) of Regulation 11. The learned Single Judge of the Court below, it appears, erroneously equated the power of the appointing authority under Regulation 11 with the power of the authority who appointed a Corporation employee to punish under section 87 of the Act. In fact, section 87 has not used the expression, "appointing authority". A discharge under Regulation 11(b) should not be interpreted with the aid of section 87. A probationer whose service is satisfactory and who has passed the departmental examination, if any, is entitled to be confirmed. But he has no substantive or vested right to be confirmed by any particular officer or authority who might have initially placed him on probation. The power to confirm is to be exercised by the authority who at the date of confirmation of a particular employee is entitled to make appointment to the post in question. The expression, "Appointing authority" should be interpreted in the context of each particular provision and there is no reason why the said expression should be assigned one uniform meaning throughout the Calcutta Municipal Act 1951 and the Rules and Regulations made thereunder although these provisions deal with different subjects.

In relation to the post of Municipal Pleader whose maximum salary did not exceed Rs 500/- per month, the Commissioner is the appointing authority. The Commissioner can accordingly confirm a probationer for such a post, extend his period of probation by one year at a time, or discharge him. No question of deprivation of vested right of a probationer would arise if the authority empowered to make the appointment to the particular post exercises the powers under clauses (a) or (b) of Regulation 11 of the Service Regulations. A probationer has no vested right to be confirmed or discharged by the particular authority who had placed him on probation and by no other authority or officer.

Section 17 of the Bengal General Clauses Act does not contain the words which were incorporated in the Central General Clauses Act of 1897 by the Repealing Amending Act XVIII of 1928. Secondly, section 17 of the Bengal Act lays down that the power to appoint would include the power to suspend or dismiss. A discharge under Regulation 11 (b) of the Calcutta Corporation Service Regulations is not a dismissal. Therefore, in terms, Section 17 of the Bengal General Clauses Act would not be attracted.

In the instant case, at the material time the Commissioner, of the Corporation of Calcutta was the authority empowered to make appointment to the post held by Respondent no. 1. That being so, the Commissioner was quite competent to discharge Respondent no. 1 in terms of Regulation 11 (b) of the Service Regulations of the Corporation of Calcutta.

Cases referred to :—

- (1) *Bishan Lal Gupta v. State of Haryana*, 1978 (1) SCC 202
- (2) *North West Frontier Province v. Suraj Narain Anand*, AIR 1949 PC 112 : 75 IA 343
- (3) *Sisir Kumar Mitra v. Commissioner, Presidency Division & Others*, 1978 (1) CLJ 545
- (4) *Gurdial Singh Bawa v. The Director of Industries, Haryana and Another*, 1971 (1) SLR 161.
- (5) *Nanak Saran Srivastava v The State of U. P. and Others*, 1971 (1) SLR 168
- (6) *Ajoy Chandra Bagchi v. The Chief Security Officer, Eastern Railway and another*, 1975 (2) SLR 407
- (7) *Om Prakash Gupta Swadheen v. Union of India and Others*, 1975 (2) SLR 226

Pradip Kumar Ghosh for the Appellant
Samir Kumar Mukherjee and Amar Nath Dhole for the Respondents

The judgment of the Court was as follows :—

Mookerjee, J. : Arun Kumar Sen, respondent No. 1 in this appeal, and two others were initially appointed to officiate temporarily as Municipal Pleaders, Corporation of Calcutta, pending filling up of such posts permanently. On March 10, 1962 Respondent no. 1 had joined in the said post. Thereafter, the Municipal Authorities had issued advertisements inviting applications for filling up the permanent vacancies in the said posts of Municipal Pleaders. Along with others the respondent No. 1, Arun Kumar Sen, had applied. The Standing Finance Committee of the Corporation of Calcutta at its meeting held on 16th September, 1963 resolved that the present respondent No. 1, Arun Kumar Sen, and two others whose names had been recommended by the Municipal Service Commission "be permanently appointed to the three posts of Municipal Pleaders, Law Department in the grade of Rs. 200-300/- subject to the service and other allied regulations of the Corporation". On November 4, 1963 the respondent No. 1 had joined in the said post. The Corporation of Calcutta has claimed that Arun Kumar Sen, the respondent No. 1, was put on probation according to the Regulation 10 of the Service Regulations of the Corporation of Calcutta. On December 18, 1964 the Chief Law Officer, Corporation of Calcutta, had recommended that the period of probation of the respondent No. 1 be extended and the Commissioner, Corporation of Calcutta by his letter dated April 2, 1965 had extended his

period of probation for further one year. The respondent No. 1 and two other Municipal Pleaders had objected to the said extension of their probationary periods. They claimed, *inter alia*, that they had been permanently appointed and they were not put on probation. According to them the order of extension of their probationary period was illegal. On 5th July, 1965 the Chief Law Officer, Corporation of Calcutta issued a notice to the respondent No. 1 stating that he had been directed by the Commissioner, Corporation of Calcutta to communicate to him the full order passed by him "I do not consider the work of Shri A. K. Sen, Municipal Magistrate's Court lawyer, to be satisfactory. He is, therefore, not confirmed and is discharged. He may be paid one month's pay in lieu of notice". The respondent No. 1 had made representations against his discharge from service. Thereafter, he moved this Court under Article 226 of the Constitution of India and obtained Civil Rule No. 840 (W) of 1965. D. Basu, J. made the said Rule absolute. The learned Single Judge quashed the said order and commanded and restrained the respondents therein from giving any effect to the said impugned order. The learned Judge, however, made it clear that the respondents would be at liberty to make fresh orders in accordance with law. The Corporation of Calcutta being aggrieved by the aforesaid judgment of D. Basu, J. has preferred this appeal under Clause 15 of the Letters Patent.

2. The principal point in this appeal is whether or not the Commissioner, Corporation of Calcutta as the Appointing Authority was entitled to discharge the respondent No. 1 from service in terms of Regulation 11 of the Service Regulations of the Corporation of Calcutta. When the respondent No. 1 was appointed the provision of Section 80 of the Calcutta Municipal Act before the same was amended by Section 27 of the Calcutta Municipal (2nd Amendment) Act, 1964 was that appointments to the Corporation of Calcutta establishment shall be made by the Corporation of Calcutta, if the maximum salary of the office was not below Rs. 250/-. The Commissioner was the authority empowered to make appointments in all other cases. Therefore, when the petitioner was appointed, the Corporation of Calcutta was the authority empowered to make his appointment. Admittedly, the Standing Finance Committee had appointed the respondent No. 1 as a Municipal Pleader. D. Basu, J. has found that the respondent No. 1 was appointed on probation and rejected his contention that the Standing Finance Committee had straight way permanently appointed him as a Municipal Pleader and that therefore, the question of confirmation or discharge could not and did not arise. On December 5, 1964 the Calcutta Municipal (2nd Amendment) Act, 1964 came into force. Section 27 of the said amending Act substituted the words "exceeds Rs. 500/-" for the words "is not below Rs. 250/-" in clause (a)

- of Section 80 of the Calcutta Municipal Act, 1951. The said amendment was not given retrospective effect. After the said amendment of Section 80 of the Calcutta Municipal Act, 1951, the Commissioner, Corporation of Calcutta became the authority to make appointments in the Corporation establishment except in respect of offices whose maximum salary exceeded Rs. 500/- per month. Therefore, under the amended Section 80 the Commissioner became competent to make appointments to posts of Municipal Pleaders. The Commissioner, Corporation of Calcutta as already stated purported to act as the Appointing Authority of the respondent No. 1 and by the impugned order discharged him from service. D. Basu, J. has, *inter alia*, held that the respondent No. 1 by reason of his appointment as probationer had acquired a vested right. The Standing Finance Committee which had appointed the respondent No. 1 was alone competent to discharge or to confirm him. The expression "Appointing Authority" in Regulation 11 of the Service Regulations, Corporation of Calcutta according to D. Basu J. was an abbreviation for the words "authority who had appointed the respondent No. 1 and not the authority competent to make appointment to the post".

3. Mr. Pradip Kumar Ghosh, learned advocate for the appellant, Corporation of Calcutta, has submitted that the expression "Appointing Authority" in Service Regulation 11 means the authority for the time being competent to make appointment to the post in question and not the authority who actually appointed a Corporation employee on probation. According to Mr. Ghosh, the expression "Appointing Authority" has not the same connotation in the different sections of the Calcutta Municipal Act, 1951. Section 81(4) used the expression "Appointing Authority" with reference to particular post or posts and in this section the said term means the authority empowered to make appointments. Mr. Ghosh further submitted that whenever the Legislature has intended that the expression "Appointing Authority" would mean the authority who actually made the appointment, the same has been expressly stated in the particular section. In this connection Mr. Ghosh referred to the provisions of Section 87 of the Calcutta Municipal Act which specifies who would be the competent authorities for imposing punishments upon the municipal officers and servants. Section 87 clearly provides that the authority by whom such officer or servant is appointed can impose punishments by way of fine, reduction in rank, suspension, removal or dismissal from service, withholding of increments. But in the instant case, the discharge of the respondent No. 1 during his probation did not involve any punishment. Therefore, interpreting the provisions of Section 81(4) or Regulation 11 of the concept of the word "Appointing Authority" should be disassociated from the meaning of the said

expression for the purposes of punishment. Mr. Ghosh has further submitted that the Commissioner is not an authority subordinate to the Corporation of Calcutta. The Commissioner is a statutory authority exercising by his own right those powers which have been conferred by the Act upon him. Therefore, by the subsequent legislative changes the Commissioner having become the authority competent to make appointments to the post held by the respondent No. 1, he was entitled to discharge him during his probationary period. Another submission of Mr. Ghosh was that the Commissioner under Section 36 of the Calcutta Municipal Act exercises supervision and control over all municipal officers and servants who had been made subordinate to him. According to Mr. Ghosh, the expression "control" would include powers either to confirm or to discharge a Corporation employee appointed on probation.

4. Mr. Mukherjee, appearing on behalf of the respondent No. 1, on the other hand, has submitted that the Standing Finance Committee had appointed the appellant on a substantive basis. The respondent No. 1 was never put on probation and, therefore, there could be no question of either confirmation or discharge. Mr. Mukherjee secondly submitted that the expression "Appointing Authority" in the present context means the authority who had actually appointed the respondent No. 1. A subsequent change in law did not divest the Corporation of Calcutta the Appointing Authority of the respondent No. 1 of its powers either to confirm or to discharge the respondent No. 1. The amendment of Section 80 of the Calcutta Municipal (2nd Amendment) Act, 1964. Therefore, the Commissioner might have become the competent authority to make appointment to the post in question but thereby he did not become the appointing authority of the respondent No. 1 who was appointed before the second amendment of Section 80. Therefore, the Commissioner acted without lawful authority by discharging the respondent No. 1. Mr. Mukherjee also raised a minor point that the respondent No. 1 was not paid one month's salary simultaneously with the service of the letter of the Chief Law Officer dated 12th July, 1965. Therefore, the termination order never became effective.

5. The learned Single Judge has rightly held that the appointment of the respondent No. 1 by Annexure 'B' to the writ petition was subject to the terms of probation imposed by Regulation 10 of the Service Regulations. Therefore, his probation period was validly extended and he was also liable under Regulation 11(b) to be discharged on the ground that as a probationer his work was not satisfactory.

6. The Authority under Section 80 of the Calcutta Municipal Act, 1951 to make appointments to the Corporation establishment is expressly

subject to other provisions of this Act. In other words, the said authority is conditional upon fulfilment of other provisions of the Calcutta Municipal Act, 1951. The authority concerned is empowered to make appointments only in accordance with the relevant provisions of the same Act. The clause (j) of section 85(l) of the Act empowered the Standing Finance Committee to make Regulations prescribing conditions of service of municipal officers and servants. Accordingly, the Standing Finance Committee in consultation with the Municipal Service Commission has framed the Corporation of Calcutta Service Regulations. The Regulation 2 lays down that these Regulations would apply to all employees of the Corporation of Calcutta other than those specified therein. The respondent No. 1 did not claim that his post was excluded by the Regulation 2. The Regulation Nos. 2 and 3 of the Service Regulations would be also inapplicable to this case. The Corporation of Calcutta did not enter into with him a specific contract enforceable by law. There was no written contract fulfilling the requirements of Sections 110 and 111 of the Calcutta Municipal Act, 1951. Under sub-section (4) of Section 111 no contract executed otherwise than as provided in Section 111 would be binding upon the Corporation of Calcutta. The Resolution of the Standing Finance Committee appointing the respondent No. 1 was not a specific contract within the meaning of Regulation 3. Therefore, his appointment was subject to the Calcutta Corporation Service Regulations. The Regulation 10, *inter alia*, stipulates that except as otherwise provided in the Regulations every substantive appointment would be subject to a period of probation for one year which may be extended by one year at a time by the Appointing Authority. If the Appointing Authority is of the opinion that the service of the probationer is satisfactory and he has passed the departmental examination, if any, the probationer would be confirmed [vide Regulation 11(a)]. Under Regulation 11(a) at any time during the period of probation or at its close, if the appointing authority considers that the probationer's service is not satisfactory he may discharge the probationer.

7. The Resolution of the Standing Finance Committee (Ext. B to the writ petition) appointing the respondent No. 1 as a Municipal Pleader did not purport to override the Regulations 10 and 11. The Committee resolved to appoint the respondent No. 1 and two others permanently as Municipal Pleaders with the express stipulation that their appointments would be subject to Service and other allied Regulations of the Corporation. In other words, the said appointment of the respondent No. 1 was made conditional upon the observance of the Service Regulations including Regulations Nos. 10 and 11. The service and other allied Regulations were constituted terms and conditions of the said appointment of the respondent No. 1. The use of the expression "permanently appointed" in the resolution of the Standing Finance Committee

really meant that the respondent No. 1 was being appointed against a permanent post and subject to the Service and other Regulations. The appointment of the respondent No. 1 on a substantive and permanent basis without being placed on probation would have been *ultra vires* the powers of the Corporation of Calcutta or of the Standing Finance Committee which was presumably exercising delegated authority of the Corporation. The expressions "probation" or "probationer" have not been defined in the Calcutta Corporation Service Regulations or in the Calcutta Municipal Act 1951. Ordinary meaning of "probation" *inter-alia* is 'action or process of testing or putting to the proof; testing or trial of a person; conduct, character or moral qualification (vide Shorter Oxford Dictionary, 3rd Edition, Vol. II). It is not necessary to mention the various reported cases concerning termination of service of a probationer because the decision in each case turned upon its own facts. The court in each case has to consider the real nature and effect of the order of termination of services of a probationer. But at the same time a broad distinction exists between a departmental enquiry for misconduct against a permanent employee of the State and enquiry against a probationer in order to consider his fitness for confirmation. A probationer whose service is considered not satisfactory has no right to the post (see (1) *Blshan Lal Gupta v. State of Haryana*, 1978 (1) SCC 202). The order of discharge under Regulation 11 (b) of the Calcutta Corporation Service Regulations does not amount to a punishment. The respondent No. 1 was appointed subject to these provisions of the Service Regulations. During the period of probation the appointing authority was competent to decide whether he should be confirmed or should be discharged. These were parts of the conditions of service of the respondent No. 1. This view finds support from the observations of the Privy Council in (2) *North West Frontier Province v. Suraj Narain Anand*, AIR 1949 PC 112.

8. Lord Thankerton delivered the Part I of the opinion of the Privy Council in *North-West Frontier Province v. Suraj Narain Anand*, (supra), and had observed that the 'conditions of service' in Section 243 of the Government of India Act, 1935 would include the provisions which prescribe that the employer in certain circumstances might terminate the service of his employee. In *North West Frontier Province v. Suraj Narain Anand*, (supra), the Inspector General of Police, North West Frontier Province had appointed Suraj Narain Anand as a Sub-Inspector of Police. The Deputy Inspector General of Police had dismissed him on the charge of copying during a departmental examination. At the date of his appointment the Inspector General of Police only could dismiss the Sub-Inspectors. Subsequently, the relevant service Rules were amended and the Deputy Inspector General of Police became competent to exercise the said power of dismissal. *Prima facie* the said dismissal

- by way of punishment was in contravention of Section 240(2) of the Government of India Act, 1935. The State had relied upon Section 243 of the Government of India Act, 1935 and the Police Rules which authorised the Deputy Inspector General of Police to dismiss the Sub-Inspectors. The Privy Council in Part I of their opinion upheld the submission of the Government that right of dismissal was a condition of service within the meaning of Section 243 of the Government of India Act, 1935. The said section, *inter alia*, laid down that the conditions of service of subordinate ranks of police service would be such as might be determined. The Privy Council in the Part I of their opinion found as a fact that the North West Frontier Province Police Rules 1937 became operative in 1938, i.e., after the Government of India Act, 1935 had come into force on 1st April, 1937. Accordingly, the Deputy Inspector General of Police had dismissed the respondent police officer under a valid Rule. On 4th November, 1978 Lord Du Parc delivered the Part II of the opinion of the Privy Council and reconsidered their finding about the date on which the North West Frontier Province Police Rules, 1937 had come into force. Their Lordships found that the said Rules came into force four days after the respondent Suraj Narain Anand was dismissed and not before as held by the Part I of their opinion. Therefore, the Government could not rely upon these Rules to justify the dismissal of the respondent. Accordingly, their Lordships revised their earlier opinion and advised that the decision of the Federal Court granting a declaratory decree to the respondent be affirmed.

9. We have set out in some detail the facts of the *North West Frontier Province v. Suraj Narain Anand*, (supra), in order to show that the present case is entirely distinguishable on facts. The respondent No. 1 was not dismissed but he was discharged during his probationary period. The principal question is whether the expression "Appointing Authority" in Regulation 11 of the Calcutta Corporation Service Regulations means the authority who appointed the respondent No. 1 or it means the authority now competent to make appointments to the post of Municipal Pleaders. We have found that the respondent No. 1 was appointed as a probationer subject to the provisions of the Service Regulations including Regulations 10 and 11. His discharge under Regulation 11 (b) did not amount to punishment. The Regulations 10 and 11 of Calcutta Corporation Service Regulations are incidental or consequential to the power of appointment conferred by Section 80 of the Calcutta Municipal Act. These Regulations also qualify the powers of the authority empowered to make appointments under Section 80 of the Calcutta Municipal Act, 1951. The Authority empowered to make appointments under Section 80 of the Calcutta Municipal Act is required

to put on probation, any one who is substantively appointed to a permanent post. The Regulations 10 and 11 lay down the manner in which the authority competent to make appointments under Section 80 shall fill up the permanent posts. Initially the appointee to a substantive permanent post would be put on probation by the authority specified in Section 80. If the appointing authority is satisfied he would confirm the probationer in his post. On the other hand, if the said authority is not satisfied he would discharge the probationer. Therefore, the appointing authority in Regulations 10 and 11 means the authority who is empowered under Section 80 of the Calcutta Municipal Act to make appointment to the post held by a particular probationer. There is no reason why Regulations 10 and 11 should be interpreted in the light of the provisions of Section 87 of the Calcutta Municipal Act, 1951. The Section 87 has explicitly laid down that the authority by whom an officer or servant is appointed may punish such officer or servant. It would not be correct to hold that the expression "Appointing Authority" is an abbreviation of the words 'the authority who had appointed the probationer.' If this meaning is adopted, it might result in inconsistencies. In this case, after the respondent No. 1 was placed on probation in terms of a resolution of the Standing Finance Committee, the Section 80 was amended. Under the amended Section 80 of the Calcutta Municipal Act the Commissioner and not the Corporation of Calcutta became empowered to make appointment to the post held by the respondent No. 1. Therefore, the Corporation under Regulation 11 (a) could no longer confirm and substantively appoint the respondent No. 1. The authority who was empowered under Section 80 alone possessed the power either to confirm a probationer or discharge him respectively in terms of clauses (a) and (b) of Regulation 11. The learned Single Judge, in our view, erroneously equated the power of the appointing authority under Regulation 11 with the powers of the authority who appointed a Corporation employee to punish under Section 87 of the Calcutta Municipal Act. In fact, Section 87 has not used the expression, "appointing authority". A discharge under Regulation 11(b) is not a punishment and, therefore, Regulation 11(b) should not be interpreted with the aid of Section 87. A probationer whose service is satisfactory and who has passed the departmental examination, if any, is certainly entitled to be confirmed. But he has no substantive or vested right to be confirmed by any particular officer or authority who might have initially placed him on probation. The said power of confirmation is to be exercised by the authority who at the date of confirmation of a particular employee is entitled to make appointment to the post in question. The expression "Appointing Authority" should be interpreted in the context of each particular provision and there is no reason why the said expression

should be assigned one uniform meaning throughout the Calcutta Municipal Act and the Rules and Regulations made thereunder although these provisions deal with different subjects.

10. The Commissioner, Corporation of Calcutta and the Standing Finance Committee, are all authorities constituted under the Calcutta Municipal Act, 1951 which also contain provisions for distribution and exercise of powers by any of the authorities. Section 24, *inter-alia*, provides that the Corporation shall not be entitled to exercise powers, duties or functions expressly assigned by or under the Act to the Standing Finance Committee or to the Commissioner. After Section 80 was amended by West Bengal Act XVIII of 1964, the Commissioner became the authority empowered to make appointments to the Corporation establishment except in case the maximum salary of the office exceeded five hundred rupees per month. Therefore, in relation to the post of Municipal Pleaders whose maximum salary did not exceed Rs. 500/- per month, the Commissioner became the appointing Authority. The Commissioner could accordingly confirm a probationer for the post of Municipal Pleader, extend his period of probation by one year at a time or discharge him. No question of deprivation of vested right of a probationer would arise if the authority empowered to make the appointment to the particular post exercises the powers under clauses (a) and (b) of the Regulation 11 of the Service Regulations. A probationer has no vested right to be confirmed or discharged by the particular authority who had placed him on probation and by no other authority or officer.

11. Mr. Ghosh, learned advocate for the appellant, had relied upon the provisions of Section 16 of the Central General Clauses Act, 1897 and upon some reported decisions under the said Section. Before we refer to these decisions, it may be pointed out that Section 17 of the Bengal General Clauses Act does not contain the words which were incorporated in the Central General Clauses Act, 1897 by the Repealing and Amending Act XVIII of 1928. Secondly, Section 17 of the Bengal General Clauses Act lays down that the power to appoint would include the power to suspend or dismiss. A discharge under Regulation 11(b) of the Calcutta Corporation Service Regulations is not a dismissal. Therefore, in terms Section 17 of the Bengal General Clauses Act would not be attracted. Recently, Anil Kumar Sen and Dhires Chandra Chakravarti, JJ. in (3) *Sisir Kumar Mitra v. Commissioner Presidency Division & Others*, 1978(1) CLJ 545 had considered the decision in (4) *Gurdial Singh Bawa v. The Director of Industries, Haryana and Another*, 1971(1) SLR 161 and in (5) *Nanak Saran Srivastava v. The State of U. P. and Others*, 1971(1) SLR 168, which were cited by Mr. Ghosh, learned advocate for the appellant, in the

present case. The Division Bench in *Sisir Kumar Mitra v. Commissioner, Presidency Division & Others*, (supra), held that the Appointing Authority under Rule 75 (aa) of the West Bengal Service Rules would include the authority who had actually appointed the government servant concerned. Their Lordships did not further pronounce whether or not the said time would include the authority for the being competent to make an appointment to the post held by the government servant concerned. Their Lordships observed that even if the term included such an authority, there was nothing in Rule 75(aa) to exclude the authority who had actually appointed the government servant concerned.

12. Our attention has been also drawn to the decision of Anil Kumar Sen J. in (6) *Ajoy Chandra Bagchi v. The Chief Security Officer Eastern Railway and another*, 1975(2) SLR 407. His Lordship held that the term "Appointing Authority" in Rule 2046(H) of the Railway Establishment Code did not mean the authority who had actually appointed the person to be put on compulsory retirement. The term as defined by the Note added to the proviso means the authority competent to make the first appointment to the grade which the railway servant for the time being held. It was not disputed that at the relevant time when the order was made, the Chief Security Officer was competent authority to make appointments to the grade of Inspectors Grade III. Therefore, even if the petitioner might have been appointed by the General Manager, the Chief Security Officer would be competent enough to direct his compulsory retirement under Rule 2046(H).

13. The decision of the Supreme Court in (7) *Om Prakash Gupta Swadheen v. Union of India and Others*, 1975(2) SLR 226, is distinguishable from the facts of the present case. The said case arose out of a termination made under Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965. The Supreme Court in *Om Prakash Gupta Swadheen v. Union of India and others* (supra), had restored the decision of the learned Single Judge of the High Court that the definition of the word "Appointing Authority" in Rule 2(a) of the Central Civil Service (Classification, Control and Appeal) Rules, 1965 would apply and, therefore, the Director of Administration was not competent to terminate the service of the government servant concerned. In the pen-ultimate paragraph of the judgement in *Om Prakash Gupta Swadheen v. Union of India and others* (supra), it was observed that in the absence of any definition of Appointing Authority in the Central Civil Services (Temporary Service) Rules, 1965 in relation to a temporary government servant not holding a specified post, the term "Appointing Authority" must be understood in its plain and natural meaning, namely, the authority which appointed him. We have already indicated that the expression "Appointing Authority" in Regulation 11 of the Calcutta Corporation Service Regulations should be interpreted in the light of the provisions of Section 80 of the

•Calcutta Municipal Act. We have further pointed out that the Regulations 10 and 11 qualify the powers of appointment under Section 80 and these Regulations lay down the manner in which substantive appointments to permanent posts in the Corporation establishment are to be made. The confirmation of a Corporation servant on probation must be made by the authority who is competent under Section 80 to make appointment to the post in question. In this case, at the relevant time the Commissioner, Corporation of Calcutta was the authority empowered to make appointment to the post held by the respondent No. 1. Therefore, the Commissioner was quite competent to discharge the respondent No. 1 in terms of Regulation 11(b).

14. In the above view, it is unnecessary for us to consider the other arguments of Mr. Ghosh, learned advocate for the appellant, regarding the scope and effect of Section 36 of the Calcutta Municipal Act, 1951 and whether the power and control of the Commissioner contemplated in the said section include a power to confirm or discharge any Corporation employee appointed on probation.

15. The clause (a) of Section 80 of Calcutta Municipal Act, 1951 was further amended by Calcutta Municipal (Third Amendment) Act 1972, but we have not dealt with the effect of the said amendment of the law which was made after the respondent No. 1 was discharged from service.

16. For the foregoing reasons, this appeal succeeds.

We, therefore, allow this appeal, set aside the order of the learned Single Judge and discharge the writ petition of the respondent No. 1.

There will be no order as to costs.

Ray, J. : I agree.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Amar Nath Banerjee

Decision : June 29, 1978

Paresh Chandra Chatterjee

...

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Appellant

Versus

Probodh Chandra Majumdar

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Respondent*

Civil Procedure Code—Or. 30, rr. (1) & (10)—Difference between these rules—Ejectment suit—Notice to quit given in personal name of landlord—Validity of such notice being challenged—Whether such notice is required to be given in landlord's personal name or in the name of partnership firm when landlord is the plaintiff.

Under Order 30, Rule 1 of the Code of Civil Procedure which governs the present suit, any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm of which such persons were partners at the time of the accruing of the cause of action. But under Rule 10 of Order 30 any person carrying on business in the name or style other than his own name may be sued in such a name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules under Order 30 shall apply. Thus there is a distinction between Or. 30, rule 1 and Or. 30 rule 10 of the Code. Accordingly a person carrying on business in a name or style other than his name may be sued in such name and style as if it were a firm but such a person cannot sue another in the name or style of such firm. In fact, a person carrying on trade or business under the name and style of his own name cannot be said to have constituted a firm. That being the position, it appears that both the courts below fell into error in construing that the notice to quit which was served by an Advocate on behalf of Paresh Chandra Chatterjee was a different person from Paresh Chandra Chatterjee carrying on business as the sole Proprietor under the name and style of P. C. Chatterjee & Co. which is his sole proprietary concern and similarly he also could not have served a notice under the name and style of P. C. Chatterjee & Co. even though the tenant might have been inducted by him on behalf of P. C. Chatterjee & Co. Hence the notice to quit which was admittedly served on the defendant was legal, valid and sufficient and accordingly the defendant who was a habitual defaulter in payment of rent since 1968 as alleged by the plaintiff, was not entitled to any protection from eviction.

Cases referred to :—

(1)* *Bhaggan Manaji v. Hiraji Premaji Marwadi*, AIR 1932 Bom 516(2) *Jamunadhar Pooder Firm v. Jamunaram Bhakat*, AIR 1944 Cal 138

P. N. Mitra, Aditya Narayan Roy and

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Narendra Chandra Saha

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for the Appellant

Bankim Chandra Dutt and Dilip Kumar Banerjee

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for the Respondent

*Appeal from Appellate Decree no. 132 of 1976.

The judgment of the Court was as follows :—

This appeal at the instance of the plaintiff arises out of a suit for eviction of a monthly tenant on the ground of default in payment of rent after terminating his tenancy with the expiry of the month of May, 1971 by the service of a combined notice under section 106 of the Transfer of Property Act read with section 13(6) of the West Bengal Premises Tenancy Act. Originally the suit was instituted by the plaintiff Paresh Chandra Chatterjee. Subsequently, by an amendment of the cause title of the plaint it was added 'Paresh Chandra Chatterjee carrying on business as sole proprietor under the name and style, P. C. Chatterjee and Company. The tenant defendant put in a written statement denying the material averments made in the plaint and also challenging the legality and validity of the notice to quit. It appears that for non-compliance of the provisions of section 17(1) and 17(2) of the West Bengal Premises Tenancy Act, his defence as against delivery of possession was struck out under section 17(3), of the said Act. Thereafter both parties went to trial on the question of legality and the validity of the notice to quit only. The service of the notice on the defendant was not denied. Now both the courts have found that the notice, which was served on the defendant, was not legal and valid inasmuch as it was served by an Advocate on behalf of one Paresh Chandra Chatterjee who is not the one and the same person as described in the cause title in the plaint, namely Paresh Chandra Chatterjee carrying on business as sole proprietor under the name and style of P. C. Chatterjee & Company. Accordingly, the suit was dismissed by both the courts below.

2. In my view, the approach of both the courts below was bad in law and such an approach has vitiated their findings. Under Order 30 Rule 1 of the Code of Civil Procedure, 1908 which governs the present suit any two or more persons claiming or being liable as Partners and carrying on business in India may sue or be sued in the name of firm of which such persons were Partners at the time of the accruing of the cause of action. But under Order 30 Rule 10 any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name, and so far as the nature of the case will permit all Rules under Order 30 shall apply. We thus find a distinction between Order 30 Rule 1 and Order 30 Rule 10 of the Code of Civil Procedure. Thus a person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm but such a person cannot sue another in the name or style of such firm. In fact a person carrying on trade or business under the name and style of his own name cannot be said to have constituted a firm. In case of (1) *Bhaggan Manaji & Ors v. Hiraji Premaji Marwadi*, reported in AIR 1932 Bombay 516 a Bench of the Bombay High Court held that one man cannot constitute a

firm, and a person treating himself as a firm or in an assumed or trading name may be sued in his trading name under Order 30 Rule 10 but he cannot sue in that name. Similar distinction between Order 30 Rule 1 and Order 30 Rule 10 was also noticed by a Bench of this Court in the case of (2) *Jamunadhar Poddar Firm v. Jamunaram Bhakat & Ors.* reported in AIR 1944 Calcutta 138. I respectfully agree with the principle as laid down in the said two decisions and of the view that both the courts fell into error in construing that the notice which was served by an Advocate on behalf of Paresch Chandra Chatterjee was a different person from Paresch Chandra Chatterjee carrying on business as Sole Proprietor under the name and style P.C. Chatterjee & Co. which is his sole proprietary concern and similarly he also could not have served a notice under the name and style of P.C. Chatterjee & Co. even though the tenant might have been induced by him on behalf of P.C. Chatterjee & Co. I, therefore, find that the notice which was admittedly served on the defendant was legal, valid and sufficient and accordingly the defendant who was a habitual defaulter of rent since 1968 as alleged by the plaintiff, was not entitled to any protection from eviction.

3. In the result, the judgment and decree of the learned lower appellate court is hereby set aside and the appeal is allowed. The defendant respondent do render vacant possession of the suit premises to the plaintiff within three months from this date failing which the plaintiff would be entitled to recover possession thereof by evicting the defendant in execution of the decree. The plaintiff do get costs throughout.

P.R.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Ganendra Narayan Roy

Decision : January 3, 1978

Haripada Mondal & Ors. ... **Petitioners**

Versus

State of West Bengal & Ors. ... **Respondents***

West Bengal Estates Acquisition Act 1953 (1 of 1954), Sec. 10(2)&(6)
—Procedure for taking possession after vesting—Possession to be taken by Collector u/s. 10(2)—Such procedure not followed by State—State incompetent to settle such land to others unless possession is taken in accordance with law.

In the instant case, the licence fees at the rate of Rs. 10/-per acre have been realised from the present petitioners under section 10(6) of the West Bengal Estates Acquisition Act. It has been provided in section 10(6) of the Act that the intermediary or any person who

* Civil Rule no. 2121 (w) of 1973.

possesses the land which was in Khas possession of the intermediary before vesting but which the intermediary had not retained or cannot retain under section 6, then whether possession of such land has been taken by the Collector in pursuance of sub-section (2) or not the intermediary or such person shall be liable for payment for the period for which he is in possession of such land. Hence the State Government must take possession of the lands of the petitioners in accordance with law and thereafter settle such lands to any other persons. So long the possession of the petitioners' lands is not taken by the State Government in accordance with law, the State Government cannot settle the disputed lands to any other person.

Case referred to :—

(1) *Md. Kalu Molla v. State of West Bengal*, an unreported decision of P. K. Banerjee, J. in CR no. 601(w) of 1973

Samar Kumar Ghose for the Petitioners

The judgment of the Court was as follows :—

In this Rule the petitioners possessed 6.50 acres of agricultural lands appertaining Plot No. 4054 of Khatian No. 1008 of Mouza Mohonpur in the District of 24-Parganas and for such possession of the land, it appears that petitioners had to pay at the rate of Rs. 10/- per acre to the State Government under Section 10, Sub-Section (6) of the West Bengal Estates Acquisition Act, 1953. The petitioners state that they have been in possession of the said lands for a number of years and had paid to the State Government fees at the said rate of Rs. 10/- per acre for such occupation of the lands in question. The petitioners' case is that the State Government is intending to settle these lands to other persons, but as the petitioners are in possession of the said lands no such settlement can be made by the State Government without evicting the petitioners in due course of law. In this connection the petitioners relied on an unreported decision made in the case of (1) *Md. Kalu Molla v. The State of West Bengal & Ors.* in Civil Rule No. 601(W) of 1973. Banerjee, J. held in the said case that the petitioner who similarly held some lands on payment of licence fees could not be automatically ousted from the said land by giving settlement to others and such settlement could be made only when the petitioner is evicted in due course of law or by any other legislative process. Liberty was given to the respondents in the said case to take such other proceedings as they may be advised for eviction of the petitioner and thereafter to make settlement of the land. In my view, the decision made in the said unreported judgment applies to the facts and circumstances of the present case. It may be stated in this connection that the fees at the rate of Rs. 10/- per acre were realised from the present petitioners under section 10 (6) of the West Bengal Estates Acquisition Act and it has been provided in Sub-section (6) of section 10 of the said Act that the intermediary or any other person who possesses the land which was in the khas possession of the

intermediary before the date of vesting but which the intermediary had not retained or could not retain under section 6, then whether possession of such land has been taken by the Collector in pursuance of sub-section (2) or not the intermediary or such person shall be liable for payment for the period for which he is in possession of such land. Hence the State Government must take possession of the lands of the petitioner in accordance with law and thereafter settle the said lands to any other persons. So long the possession of the petitioners' lands is not taken by the State Government in accordance with law, the State Government cannot settle the said lands to any other persons. To the extent above this Rule is made absolute, but liberty is granted to the State Government to evict the petitioners in due course of law and thereafter to make settlement of the said land to other persons. In the facts of the case there will be no order as to costs.

T.K.M.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Murari Mohan Dutt and Mr. Justice

Dhires Chandra Chakravarti

Decision : January 24, 1978

Amar Nath Ash & Ors. ... (Deft) Petitioners

Versus

Mahadeo Saraf ... (Plff) Opposite party*

Civil Procedure Code—Or. 11, r. 15—Inspection of documents referred to in plaint—No time limit prescribed—Defendants entitled to ask for production of such documents at any time—Conditional order as made in instant case, is not sustainable.

A prayer was made by the petitioners (defendants) before the learned Judge, 2nd Bench, City Civil Court, Calcutta for allowing them to inspect certain documents referred to in the plaint. The learned Judge, on such a prayer in the petition directed that the petitioners could inspect the documents only after the filing of their written statement. That directive is being challenged in this Rule.

***HELD :** Rule 15 of Order 11 of the Code does not specify any period of time within which an inspection of documents can be asked for by a party to the suit. On the otherhand, the said Rule clearly provides that such an inspection can be asked for by a party at any time.

Even though the petitioners, in the instant case, have not as yet, filed their written statement, they are entitled to ask for inspection of the documents which have been referred to in the plaint from the opposite party.

K. B. Kanjilal ... for the Petitioners

Uday Sankar Chatterjee ... for the Opposite party

*Civil Rule no. 3073 of 1977.

The judgment of the Court was as follows :—

Dutt, J. : This Rule is at the instance of the Defendants and it is directed against Order No. 17 dated June 3, 1977 of the Learned Judge, City Civil Court, Calcutta. By the said order the learned Judge directed that the prayer of the petitioners/defendants for inspection of documents would be allowed after the filing of written statement by them. The learned Judge directed the petitioners to file written statement by July 5, 1977 which has long expired.

2. Before us, it has been stated on behalf of the defendants that they want inspection of only two bills being bill Nos. 134/72 dated 21.8.72 for Rs. 2074.41 p. and 135/72 dated 21.8.72 for Rs. 2075.01 p. The petitioners do not claim inspection of other documents in respect of which a prayer was made in that regard in the court below. It may be stated here that the opposite party referred to certain documents including the above two bills in the plaint. The petitioners prayed for inspection of those documents before they filed their written statement.

3. The learned Judge seemed to have thought that so long as the written statement was not filed by the petitioners no inspection could be granted to them as prayed for.

4. Rule 15 of Order XI of the Code of Civil Procedure provides, *inter-alia*, that every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits, reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof. The Rule does not, therefore, specify any period of time within which an inspection can be asked for by a party. On the contrary, the Rule provides that such an inspection can be asked for by a party at any time.

5. In our view, therefore, even though the petitioners have not filed the written statement, they will be entitled to ask for inspection of the documents which have been referred to in the plaint of the opposite party. In these circumstances we set aside the order of the learned Judge, and direct that the opposite party shall grant inspection of the above two bills only within such time as the learned Judge shall fix in that regard after the arrival of records in the court below. The Rule is made absolute to the extent indicated above. There will be no order for costs.

Chakravarti J. : I agree.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee and Mr. Justice

Bankim Chandra Ray

Decision : July 10, 1978

Bijoli Choudhury ... Appellant

Versus

Sukomal Choudhury ... Respondent*

Hindu Marriage Act (25 of 1955), Sec. 10—Judicial separation—Application made by husband on grounds of cruelty and desertion—Burden of proof—Animus Deserendi to be established—Divorce in the alternative—Allegations to be proved also.

The husband presented a petition praying for a decree for judicial separation under section 10 of the Hindu Marriage Act 1955 before the District Judge, Alipore, the grounds being cruelty and desertion. The wife contested the said suit. The suit was decreed. The wife preferred an appeal to this court. At the appellate stage, the husband made an application for amendment of his petition under section 10 filed in the trial court for inserting a prayer that a decree of divorce be granted to him under clauses (ia) and (ib) of section 13(1) of the Hindu Marriage Act.

The question that arises in this appeal is whether or not the trial court has correctly found that the wife after solemnization of the marriage had treated her husband with cruelty and whether or not she had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition under section 10 of the Act.

HELD: Tolstoy in his book gives a definition of the expression "cruelty". According to the learned author, cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such a danger. Section 10(1)(b) of the Hindu Marriage Act gives substantially the same meaning of the expression "Cruelty". The question of mental cruelty should be answered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status of the parties, environment of the parties etc.

In the Hindu Society, a wife is generally expected to be unswervingly faithful to her husband and the wife in her turn demands from her husband similar fidelity. So far as the instant case is concerned, there is no sufficient evidence of any mental or physical cruelty on the part of the wife so as to justify the passing of a decree either for judicial separation or for a divorce.

*Appeal from Original Decree no. 64 of 1976.

The burden of proof was upon the husband who was the petitioner in the court below. The learned Judge of the court below wrongly placed such burden of proof upon the wife. The trial court further committed a serious error of procedure by overlooking that the material part of the husband's evidence was not corroborated by his friends, relatives or neighbours. It is well settled that the courts are reluctant to find cruelty on the evidence of the petitioner unless there is corroborative evidence to support his allegations, but corroboration is not essential though it is, in practice, required unless its absence can be satisfactorily accounted for.

In this case, the husband has failed to establish that his wife was guilty of acts of cruelty.

The husband has neither proved the factum of desertion by his wife nor the intention on the part of the wife to bring their co-habitation permanently to an end. In other words, acts attributable to animus deserendi of the wife have not been established in the present case.

The appeal is allowed.

Cases referred to :—

(1) *Bipinchandra Jaisinghbai Shah v. Pradhavali*, AIR 1957 SC 176

(2) *Lachman Uttamchand Kirpalani v. Munaalies Meta*, AIR 1964 SC 40

Prasun Chandra Ghosh and Nagendra Mohan Saha ... for the Appellant
B. K. Ghosh, Ranjit Kumar Ghosal and Rabindra Nath Datta
 ...for the Respondent

The judgment of the Court was as follows :—

Mookerjee, J. : On February 27, 1963 the respondent Sukomal Choudhury, had married the appellant, Bijoli Choudhury, according to Buddhist Rites at P. 12/1, Dihi Serampore Road, P. S. Beniapukur, Calcutta. On 23rd November, 1972 the respondent-husband presented a petition under Section 10 of the Hindu Marriage Act in the District Judge's Court, Alipore prying for a decree for judicial separation. The present appellant contested the said case. The learned Additional District Judge, 2nd Court, Alipore by his judgment dated 7th July, 1975 granted a decree for judicial separation on the ground that the appellant had treated her husband respondent herein with cruelty within the meaning for Section 10(1)(b) of the Hindu Marriage Act. According to the learned Additional District Judge, she had also deserted her husband for two years or more within the meaning of Section 10(1)(b) of the said Act. The appellant wife has presented this appeal against the said decision of the learned Additional District Judge, 2nd Court, Alipore. During the pendency of this appeal the Marriage Laws (Amendment) Act, 1976 was enacted which *inter-alia* made several amendments in the Hindu Marriage Act, 1955. The respondent husband has filed an application in this Court for amendment of his petition/plaint filed in the Court below *inter-alia* for inserting a prayer that a decree of divorce be granted to him under

clauses (ia) and (ib) of sub-section (1) of Section 13 of the Hindu Marriage Act. The said application of the respondent husband has been heard along with the appeal preferred by the appellant wife. We have to consider whether or not the learned Additional District Judge has correctly found that the appellant wife after solemnization of the marriage had treated her husband with cruelty and whether or not she had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition under Section 10 of the Hindu Marriage Act.

2. Both the appellant and the respondent, as already stated, are Buddhists and their families came from the district of Chittagong. The respondent husband in his evidence stated that when he was aged five, both his father and mother had died. He was brought up by his grandmother and then by his aunt. According to the appellant-wife her father used to give monetary help to her husband even before he married her. The respondent husband however did not admit the said fact. But even according to him, he had started living in the house of his prospective father-in-law three months before his M. A. examination. In November, 1962 the respondent had passed his M. A. examination in Pali language and he stood first in the first class. On 27th March, 1963 the marriage between the parties took place at the residence of the appellant's father at Dihi Serampore Road, Calcutta and the respondent continued to live in his father-in-law's house.

3. The respondent-husband in paragraph 6 of his petition under Section 10 of the Hindu Marriage Act had claimed that the marital life of the parties had started quite happily and their days were passing normally except for minor differences of views over small matters. He had further averred in his petition under Section 10 of the Act that in or about the year 1965 the appellant slowly had a change in her behaviour. She became arrogant about her father's status in society in comparison with his family and his social status. She showed her undue superiority complex and vanity. She tried to subdue him with an air of superiority. In the year 1966 the appellant had become pregnant. She did not allow the doctors and nurses to examine her condition and abused and misbehaved with them. The baby was seriously injured during delivery and died six days after. After this, according to the husband, his wife showed "landslide change in her behaviour for the worse. She became nagging and on every word or act of the petitioner would find fault with him and abused him". She was full of uncontrollable rage and used filthy abuses. The husband further alleged that she did not hesitate to raise her hands on him. The husband in his petition also alleged that he used to impart occasional coaching to a girl student. His wife used to suspect him of being immorally involved with the girl student and on this account abused and insulted him. Even while he was teaching the

girl student, the wife had also stood in the way of her husband from visiting Harvard University in U.S.A. for doing research work. He was not allowed to take up a post in the Benaras Hindu University.

4. The husband in his petition further alleged that his wife under sadistic cravings had drugged him and he had become sick with severe infection in his stomach. The doctors had given up hope of curing him. He was shifted to a rented house where his relatives arranged for his treatment. His wife was brought there against her will but she had misbehaved with his relatives and had left him on her own accord with positive intention of not returning again. Thereafter, the husband was allegedly cured by means of a supernatural drug. The husband claimed in his petition under Section 10 that he had always hoped that with the passage of time his wife would understand his difficulties and would mend her habits and manners. He had patiently waited but his hopes were shattered. She and her men had threatened him time and again unless he would agree to go back to his father-in-law's house. She had tried to vilify and humiliate her husband on many occasions by going to his college and residence with her associates and hired goondas propagating and throwing insults against him. She had maliciously written offensive letters to the college authorities and other persons levelling false accusation. He was thereby humiliated. She had published offensive leaflets levelling false accusation against him. The respondent husband in his petition under Section 10 *inter alia* averred that from the conduct of his wife he had a reasonable doubt that if he lived with her, it would be harmful and injurious both for his mind and body. Hence he had been compelled to apply for judicial separation. The husband in his petition had also alleged that his wife had established an illicit relation and intimacy with one Debabrata Chakraborty. The said allegation, however, was not ultimately pressed and Mr. B.K. Ghosh, learned advocate for the respondent in this appeal, also submitted that his client does not wish to make any submission in respect of the said allegation against the appellant. The trial court allowed the husband's prayer for amendment of the petition under Section 10 containing the alleged particulars of mental cruelty of his wife. The respondent husband had examined one Sambhu Nath Chattarjee as P.W. 1 and himself as P.W. 2. He had proved some letters written by his wife Bijoli. The appellant wife had examined her sister and herself. She had also produced some letters to rebut the case against her. The learned Additional District Judge believed the evidence given on the husband's side found that the wife was guilty of mental cruelty towards her husband. The learned Additional District Judge did not record any finding of physical cruelty against the wife and in fact at the trial the husband did not attempt to prove the said kind of cruelty. The learned Additional District Judge held that the real trouble had started when the husband started coaching a girl student named Lipika

and the wife had falsely alleged that there was an improper or immoral relationship between her husband and Lipika. The wife by making false allegations about his conduct and behaviour had shocked her husband. The learned Additional District Judge further held that it was for the wife to prove that her husband had been living in adultery with Sarbani Chatterjee, daughter of Sambhu Nath Chatterjee, P.W. I. The learned Additional District Judge held that the said allegation to be absolutely a myth and that the wife with a view to damaging the reputation and character of her husband had cooked up the said story. The wife had made false allegations against her husband by writing letters, making representations and by circulating leaflets. Therefore, she was guilty of acts of cruelty within the meaning of Section 10(1)(b) of the Hindu Marriage Act. The learned Additional District Judge also found that the wife had deserted her husband in the year 1967.

5. We may proceed to examine the evidence adduced in the case in the light of the probabilities and surrounding circumstances. Admittedly, the respondent Sukomal was given shelter in the house of the appellant's father sometime before he appeared in the M.A. examination and after his marriage with the appellant on 27th March, 1963 the parties had lived at the residence of the appellant's father. At the beginning the wife's behaviour towards her husband was good, even according to her husband but he alleged that about one and half years after their marriage his wife changed her behaviour. One and half years from the date of their marriage would be about the last quarter of the year 1964. But no credible reason was given by Sukomal for this change of attitude of his wife apart from his vague allegations of her exhibiting a superiority complex towards him because of differences in their social status. In fact, in his petition under Section 10 of the Hindu Marriage Act, the husband had alleged that from the year 1965 his wife had begun to misbehave. According to the evidence given by him his father-in-law was a Clearing Agent of the Customs Department but there was no precise evidence about the financial condition of the wife's family. There was no evidence that Bijoli's father compared to her husband enjoyed a high social status. There was no reason for considering Sukomal as inferior in any way. He was holder of a 1st Class Master's degree. In April, 1964 he was offered admission to the Graduate School of Arts and Science of Harvard University (vide Ext. 1). In November, 1964 the respondent was appointed as a Lecturer in the Government Sanskrit College. Therefore, it was highly improbable that his wife would ill-treat him and in fact in the year 1965 when he was no longer an unemployed person. Some relatives of the respondent husband lived at Jalpaiguri and both the husband and the wife several times had visited them. The plaintiff husband did not attempt to prove the allegations in paragraph 10 of his petition under Section 10 of the Hindu Marriage Act that his wife

had demonstrated with unusual vanity and superiority complex and had quarrelled with the members of his family or that she used to despise or hate them. In fact, apart from examining Sambhu Nath Chatterjee, P.W. 1; in whose tenanted house the husband had allegedly lived as a paying-guest in the end of the year 1967, no relative of the two parties was examined as a witness to prove that Bijoli had ill-treated her husband and his relatives. Therefore, there was no corroboration of these vague and general statements made by the husband in course of his evidence that his wife used to display a superiority complex and that she used to abuse and insult him. The parties had recently married, both were young and the husband who was a qualified person had secured a lectureship in the Government Sanskrit College. While the husband was doing research work his wife was still a college student. We find no cogent reason has been given why Bijoli would behave so unnaturally with her husband. Therefore, we are not prepared to believe that after one and half years of their marriage the wife had changed her behaviour or that she used to abuse and slight her husband. It was the case of both parties that on 7th December, 1966 the appellant wife had given birth to a child at Chittaranjan Hospital and the child unfortunately died within a few days. Within two days of the birth of the said child the respondent husband had left Calcutta for appearing in an interview at Patiala. He had returned after the death of their child. The respondent husband did not examine any doctor or any hospital staff to corroborate his allegation that his wife used to assault even the doctors who came to examine her during her pregnancy. We also find that it was utterly improbable that his wife did not co-operate with the doctors at the time of the delivery of her child.

6. It appears from the evidence that there were differences between the husband and his wife when the husband began to coach a girl student named Lipika Bose. According to the husband from the end of 1966 he used to coach Lipika at his father-in-law's house. His wife used to suspect his illicit connection with the said student. His wife had uttered abusive language in the presence of the said girl student. Mr. B.K. Ghosh, learned advocate for the respondent, has pointed out that the husband, P.W. 2, was not specifically cross-examined with reference to his said statements in examination-in-chief and therefore, the said part of the case was not traversed. We find that during the cross-examination of Sukomal it was suggested that he was in love with Lipika and one day he had disclosed to his father-in-law about his intention to marry her. Both the appellant and her sister during their evidence had spoken about the same. In our view it was improbable that the respondent would seek permission of his father-in-law for marrying second time. Further, even assuming that the respondent husband had any tender feelings towards Lipika, it was unlikely that he would misbehave with his said pupil in the very house

of his father-in-law. This part of *Bijoli's* case against her husband appeared to be an embellishment. It is more probable that the appellant wife had objected to the respondent husband coaching Lipika and it was likely that between the two there was some bad feeling. But there was no evidence that Bijoli had ever assaulted him. There is also no evidence worth the name that her act and conduct had caused reasonable apprehension in Sukomal's mind that it would be harmful and injurious to live with his wife. Further, according to the evidence of the respondent he had given up coaching Lipika within a month. Lipika had married in the year 1970. The respondent husband had continued to live in her father-in-law's house till his illness some time in the year 1967. Therefore, we are unable to believe that due to misbehaviour of his wife over Lipika incident he was compelled to leave her father-in-law's house. The appellant wife might have been jealous and might have objected to her husband to coach a young girl student. But, there was no corroboration of Sukomal's evidence that his wife Bijoli had committed acts of mental cruelty towards him. Occasional misunderstanding and difference of opinion between the two spouses are not uncommon. But they are generally only passing phases in conjugal life.

7. In the year 1967 Sukomal left the Dihi Serampore Road house not because of his wife's treatment but because he claimed that he had become seriously ill. We also reject the utterly improbable story that the husband had become ill in the year 1967 because his wife had administered some poison to him. The doctors who might have examined him did not testify in the case. There is no definite evidence about the nature of his illness. It may be that the husband had suffered from some stomach ailment which according to him was allegedly cured by a *Deiva* medicine. But we disbelieve that Bijoli had tried to poison her husband. In 1967 after he became ill the respondent husband went to Jalpaiguri and on his return he first lived with his maternal grand uncle at Howrah. Thereafter the husband and the wife and his aunt resided in a tenanted flat at Patipukur. P.W. 2 in his evidence did not explain what he meant by the words "she did not co-operate with me nor did she do any household work". Even according to him when she lived in the Patipukur residence there was no incident. Therefore, there was not even any allegation by the husband that during their residence at Patipukur his wife had committed any of mental or physical cruelty towards him. He had even denied the suggestion in the course of his cross-examination that his wife used to live in a separate room or that he had cruelly treated and assaulted her during her stay at Patipukur. According to Sukomal his wife voluntarily went away. We need not consider whether or not it was true that it was the father of the appellant used to provide rationed articles at the Patipukur residence. Since same time in the year 1967 the husband and the wife had lived

separately. The husband in his evidence admitted that he did not inform his wife or her father about his whereabouts. According to the evidence adduced in this case that after his wife left Patipukur residence the respondent husband shifted to an accommodation in Beniatola Lane. He became acquainted with Sambhu Nath Chatterjee (P.W. 1) and his family. Some time in the year 1969 the respondent and Sambhu Nath Chatterjee and his family began to live in the different portions of the same house in Beniatola Lane. According to Sambhu Nath Chatterjee, P.W.1, the respondent lived in one room and his food used to be supplied by the landlord. P.W.1 and his family lived in one room in the ground-floor and one room in the first floor. Subsequently, the respondent began to be provided with food by the P. W. 1 on payment. Both the respondent and Sambhu Nath Chatterjee and his family shifted to a house in 40C, Biplabi Pulin Das Lane, Badurbagan. The Tenancy was in the name of the respondent and Sambhu Nath Chatterjee was a sub-tenant under him. Thereafter, Sambhu Nath Chatterjee and his family shifted to a flat at 48, Green Avenue, Santoshpore. The respondent also began to live in the same house as a paying guest of Sambhu Nath Chatterjee. The husband denied that there was any immoral relationship between him and Sarbani Chatterjee, a daughter of Sambhu Nath Chatterjee. On the other hand, both the wife Bijoli and her sister, D.W. 1, had alleged that Sukomal had illicit relations with Sarbani. The learned Judge of the Court below has not believed the evidence given on the side of the wife that one day very early in the morning she accompanied by several others had visited the Badurbagan flat where Sambhu Nath Chatterjee and his family and also the respondent husband were then living. The party found an adult girl sleeping in the bed of Sukomal. On the occasion Bijoli, the appellant visited Badurbagan flat of her husband she found the doors of his room open. This part of her story was improbable. It was not very likely that an unmarried girl like Sarbani belonging to a Bengali middle class family would openly sleep with the husband of another woman while in the adjoining room other members of her family were living. At the same time, it was somewhat unusual that after refusing to live with his wife, Sukomal had begun to reside within the same house with Sambhu Nath Chatterjee and his family. We are not prepared to believe that Bijoli and her companions had threatened and abused her husband and that the same should be designated as cruelty. According to Sukomal, P.W. 2, when his wife went to the Badurbagan flat Mr. P.C. Majumdar, who was his teacher and the then Secretary of the Post Graduate Arts Department of the Calcutta University also accompanied her. It was more reasonable and probable to hold that Bijoli accompanied by late P.C. Majumdar and some others went to Badurbagan flat of her husband in order to persuade him to return and again live with her. Mr. B. K. Ghosh, learned advocate for the respondent,

submitted that according to the evidence given on the side of his client there were two incidents on two different dates at Badurbagan. On one occasion there was a *hulla* created by Bijoli and her men as claimed by Sukomal and Sambhu Nath Chatterjee, P.W. 1 and 2. It appears from the evidence of Sukomal, P.W. 2, that on one occasion his wife accompanied by some girls went to his Badurbagan flat and they had uttered abusive language in the presence of many persons in the locality. We are not prepared to believe that Bijoli had acted in a manner which might have caused apprehension about the safety of Sukomal. Afterall, Sukomal had admittedly declined to return to his father-in-law's house and to live with his wife. He was living with Sambhu Nath Chatterjee (P.W. 1) and his family which included Sarbani, who was young and unmarried. It would be reasonable and probable to hold that his wife Bijoli accompanied by some others went to the Badurbagan residence of Sukomal and had requested him to return but Sukomal declined. There might have been argument and exchange of words between Bijoli and Sukomal. Even Sambhu Nath Chatterjee had merely stated that the wife of Sukomal with 6/7 men had come to Badurbagan Street and had created the *hulla*. Sambhu Nath Chatterjee was then in bed. He did not elaborate what he meant by *hulla* and he did not also state that Bijoli and her companions had held out threats. Admittedly, over the said incident no diary was lodged in the local police station. No other resident of the locality deposed on Sukomal's side. Atleast on one occasion Mr. P.C. Majumdar who was the Secretary of the Post Graduate Arts Department of the Calcutta University and who was a teacher of Sukomal went with Bijoli to his Badurbagan flat. It would be utterly improbable that a man like Mr. P.C. Majumdar could have been a member of a party which held out threats to Sukomal.

8. Mr. B.K. Ghosh, learned advocate for the respondent, submitted that Bijoli used to insult her husband and there was enough evidence of her mental cruelty towards him. He submitted that the decree passed by the court below should be upheld. In this connection he relied upon several passages from Tolstoy's *The Law and Practice of Divorce and Matrimonial Causes* (5th Edn) 1967. According to the said learned author, cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. Section 10(1)(b) of the Hindu Marriage Act gives substantially the same meaning of the expression 'cruelty'. The question of mental cruelty should be answered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status of the parties, environment of the parties etc.

9. Mr. B.K.-Ghosh, learned advocate for the respondent, submitted

that the trial court ought to consider the cumulative effect of the conduct of Bijoli towards her husband throughout their married life. She slighted her husband whenever he raised his voice and Bijoli abused and insulted him. She was suspicious, created scenes when her husband began to coach Lipika. Therefore, Sukomal reasonably apprehended danger and injury if he continued to live with her. Therefore, he was compelled to live separately. But one should bear in mind that in the Hindu society a wife is generally expected to be unswervingly faithful to her husband and the wife in her turn demands from her husband similar fidelity. In our view, there was no sufficient evidence of any mental or physical cruelty on the part of Bijoli so as to justify the passing of a decree either for judicial separation or for divorce.

10. The burden of proof was upon the husband who was the petitioner in the court below. The learned Additional District Judge wrongly placed such burden of proof upon the wife. The learned Additional District Judge also committed a serious error of procedure by overlooking that the material part of the Sukomal's evidence was not corroborated by his friends, relatives or neighbours. Sambhu Nath Chatterjee, P.W. 1 also spoke about the 'hulla' on one occasion when Bijoli and her companions came to persuade Sukomal to return to her. It is well-settled that the courts are reluctant to find cruelty on the evidence of the petitioner, unless there is corroborative evidence to support his allegations, but corroboration is not essential, though it is, in practice, required unless its absence can be satisfactorily accounted for (vide Tolstoy's Law and Practice of Divorce and Matrimonial Causes, 6th Edn. pages 66-67).

11. We have already observed that in this case there is no corroboration of the evidence of Sukomal, P. W. 2, that one and half years after his marriage with Bijoli her attitude had changed or that she had become cruel towards him. Neither any relative nor any acquaintance of the parties came forward to corroborate his evidence regarding Bijoli's conduct towards him up to the period 1967. In fact, Sukomal did not even allege that during their stay at the Patipukur flat Bijoli had been guilty of acts of cruelty towards him. It appears from the evidence that parties did not thereafter live together and Sukomal began to live at different addresses without disclosing the same to Bijoli. Bijoli repeatedly requested him to take her back and to return to their matrimonial home. Sukomal did not even allege that he had made even enquiries about his wife or that even offered to set up a separate household where he could live with Bijoli. He did not maintain her. There is also no documentary evidence to corroborate the case of Sukomal against his wife during the period 1964-65 to 1969. There was no reliable evidence that Sukomal's health during this period was impaired by the conduct of his wife.

12. We are unable to hold that the documentary evidence produced

by Sukomal in the court below amply corroborated his case against his wife Bijoli. Tolstoy in his aforesaid book at pages 62-63 points out that ".....temperaments of the two spouses and the mental and physical condition of the petitioner must be considered in deciding whether the respondent's conduct amounts to cruelty in the particular case; but if, after taking everything into consideration, the respondent's conduct is inexcusable, his disability will not prevent it from amounting to cruelty". The learned author in another passage dealing with 'unjustifiable conduct' has observed that "provocation may reduce the quality of the respondent's act so that it does not amount to cruelty, so, in the case of nagging, the respondent's conduct must at least be inexcusable after taking into account the petitioner's conduct which might have provoked the nagging". Before we consider the effect of this correspondence, it may be borne in mind that these letters were written by Bijoli only after Sukomal had persistently refused to resume conjugal relations with her. Thus these letters which appeared to have been written by her in desperation must be considered in the background of Sukomal's own conduct. Since some time in the year 1967 Sukomal was refusing to live with his wife and he was living in the same house with Sambhu Nath Chatterjee and his family. In the middle of the year 1971 Bijoli had written these letters to others complaining about her husband. Exts. 2A, 2B and 2C all bear the date 7th September, 1971. Bijoli in her letter Ext. 2(a) requested Dr. H. C. Chatterjee, Head of the Department of Pali, Government Sanskrit College, to prevent her husband Sukomal Choudhury from visiting Colombo. She in general terms complained that her husband had forsaken her and was also cruel to her and, therefore, he should not be permitted to leave India. Bijoli in her two other letters Exts. 2(b) and 2(c) addressed to two other professors of the Government Sanskrit College made complaints about her husband. No doubt, she used strong words but in no sense this could be treated as instances of her acts of cruelty. She had stated that she had been deserted by her husband. She suspected his fidelity. She wanted justice against her husband's 'anti-social act'. She also stated that she was prepared to take extreme steps to vindicate her rights. We are not ready to view these letters as instances of cruelty towards her husband because Sukomal himself had already abandoned her and since 1967 had repeatedly refused to live with his wife Bijoli. Sukomal appeared to have already made an irrevocable decision not to live with her. Thus already the breach between the husband and the wife was complete. We fail to see how the imputations made by Bijoli in her letters which were exhibited in the case would be treated as instances of her cruelty.

13. It is in evidence that in September, 1972 Bijoli had filed an application under Section 488 of the Criminal Procedure Code for maintenance from her husband. On 19th August, 1972 the learned Magistrate

had allowed the said application. She also made a lengthy complaint against her husband to the Director of Public Instructions, Government, of West Bengal. The Director of Public Instructions Government of West Bengal, had forwarded the same to the Principal of the Government Sanskrit College (Vide Ext. 3). The Principal of the said College had requested Sukomal Choudhury to attend a meeting with the Deputy Director of Public Instructions on the subject (vide Exts. 3 and 4). The printed pamphlet allegedly circulated by the appellant Bijoli was dated even later, e.e., 6th October, 1972. Sukomal in paragraph 25 of his petition under Section 10 of the Hindu Marriage Act filed on 23rd November, 1972 stated that the cause of action arose on 27.2.63 as also on 11th May, 10.12.68 and continued on 27.9.71, 5.4.72 and also on other various dates and was continuing day to day at P12/1, Dibi Serampore Road, Calcutta. Further, Sukomal in his said petition under Section 10 had alleged illicit relation between his wife Bijoli and one Debabrata Chakraborty. Debabrata Chakraborty however, was not made a correspondent and Sukomal did not even attempt to prove this part of his allegations. It is not necessary for us to consider whether the imputations contained in the writings of Bijoli injured the reputations of her husband but at the same time we may point out that in the facts of the case the said letters cannot be considered as evidence of her cruelty towards him. They last lived together at Patipukur flat, the conclusion would be that he had deserted her and since 1967 had been living in different addresses without disclosing his whereabouts to her. Bijoli had repeatedly requested Sukomal to come back and live with her but Sukomal had refused and was persistently avoiding her. She was in a desperate condition.

14. For all these reasons, we hold that the respondent failed to establish that his wife was guilty of acts of cruelty.

15. On the findings made by us the case of desertion against the appellant must fail. Sukomal having refused to live with her since the year 1967, he cannot contend that Bijoli had deserted her. To avoid his wife he had concealed his residential address from his wife. Since 1967 he did not maintain her. He requested her to live with him. Even in the cause title (plaint/petition of the present case) Sukomal did not state his residential address. The respondent has neither proved the *factum* of desertion by his wife, the present appellant, nor the intention on her part to bring their co-habitation permanently to an end. In other words, acts attributable to *animus deserendi* of the appellant have not been established, see (1) *Bipinchandra Jaisinghbai Shah v. Prabhavati*, AIR 1957 SC 176; (2) *Lachman Utamchand Kirpalani v. Meena alias Mota*, AIR 1964 SC 40).

16. In view of our findings made hereinbefore it is unnecessary for us to consider whether Sukomal had condoned the alleged acts of cruelty of Bijoli allegedly committed in the year 1966 by resuming co-habitation

with her. According to Mr. B. K. Ghosh, learned advocate for the respondent, Lipika incident took place before Bijoli became pregnant and gave birth to a child on 7th December, 1966. According to Mr. Ghosh, Lipika incident took place in the end of the year 1966. Further, according to Mr. Ghosh, Bijoli was again guilty of acts of cruelty in the year 1971-72. Mr. Ghosh, learned advocate for the respondent, further submitted that in this case Bijoli had throughout continued her acts of cruelty. Therefore, even if it be assumed that her cruelty over Lipika incident was condoned by her husband Sukomal after fresh acts of cruelty were committed by her, the condoned cruelty had revived and, therefore, Sukomal was entitled to bring a matrimonial proceeding against her in respect of all her acts of cruelty. In this connection Mr. Ghosh, learned advocate for the respondent relied upon a passage occurring at page 77 of Tolstoy's *The Law and Practice of Divorce and Matrimonial Causes*, 6th Edn. But, in view of our foregoing findings it is not necessary for us to consider this question of condonation. We have found that Sukomal failed to prove by satisfactory evidence that his wife was guilty of cruelty or desertion within the meaning of clauses (a) and (b) of Section 10 of the Hindu Marriage Act. When Sukomal has failed to prove his case, his prayer for passing a decree for dissolution of marriage under clauses (ia) and (ib) of sub-section (1) of Section 13 of the Act cannot be granted.

17. We, accordingly, allow this appeal, set aside the judgment and decree of the court below and dismiss the petition under Section 10 of the Hindu Marriage Act of the respondent Sukomal Choudhury. The amendment application filed by the respondent is also rejected with costs.

18. In the circumstances of the case, both parties will bear their respective costs throughout.

Ray, J. : I agree.

P.R.

[CIVIL APPELLATE JURISDICTION]

Before Justice Mrs. Jyotirmoyee Nag

Decision : June 19, 1978

Sm. Prava Sundari Debi Appellant

Versus

Pratap Chandra Das Respondent*

West Bengal Premises Tenancy Act (12 of 1956), Sec. 17(2)&(2A)
— Application of tenant under—Disposal of such application on a compromise petition incorporating certain terms as to payment with a default clause—Technical breach of such terms—Provisions of sec. 17(3) attracted—Defence against delivery of possession struck off—Effect of judgment of High

*S. A. no. 378 of 1978 with C. R. no. 345 (s) of 1978.

Court passed in exercise of revisional jurisdiction in an interlocutory matter in suit, on court disposing of second appeal arising out of the said suit.

The only point raised by the appellant is whether an application under section 17(2) of the West Bengal Premises Tenancy Act 1956 can be disposed of on compromise between the parties and if any breach is committed of the terms of the compromise whether that would amount to default and in that event whether the court can take action under section 17(3) of the Act by striking out the defence against delivery of possession.

The plaintiff (respondent herein) filed an ejectment suit on the ground of default in payment of rent. The defendant (appellant herein) entered appearance in the suit and filed an application under sections 17(2) and 17(2A). When the said application was taken up for hearing, the parties filed a joint petition of compromise incorporating certain terms for payment of arrear and current rents including a default clause and the said application under section 17(2) and 17(2A) was disposed of on the basis of the compromise petition. Thereafter as there was a breach of a term laid down in the consent order, an application under section 17(3) was filed by the plaintiff but the said application under section 17(3) was rejected by the trial court. Being aggrieved, the plaintiff moved a revisional application before the High Court and obtained a Rule. The Rule was made absolute and the order of the learned Munsif rejecting the application under section 17(3) was set aside. The said suit was thereafter decreed and the said decree was affirmed by the lower appellate court, Hence the second appeal by the tenant defendant.

The following points were raised on behalf of the appellant—

(a) Whether an application under section 17(2) can be disposed of in terms of a compromise and whether that is a jurisdictional fact.

(b) Whether the learned Judge, in disposing of CR No. 1473 of 1974 acted beyond his jurisdiction in holding that inasmuch as the terms of the compromise had been violated, the defence against delivery of possession can be struck off.

(c) Whether, the judgment of the learned Judge being without jurisdiction is null and void and can be interfered with in second appeal.

HELD: These points have been specifically dealt with by the learned Judge in his judgment in C. R. No. 1473 of 1974. On the basis of the said judgment the learned Munsif struck off the defence of the appellant against delivery of possession and decreed the suit. On appeal, the judgment and decree of the trial court was affirmed. The judgment of the learned Judge as passed in C.R. No. 1473 of 1974 is binding upon the Court disposing of the connected second appeal. Since no appeal has been preferred against that decision of the learned Judge in revision, the said decision has become final and the same questions cannot be re-agitated in the instant second appeal. Accordingly this appeal is dismissed.

P. N. Mitter, A. N. Roy and Mukti Prosanna Mukherjee ...for the appellant
A. K. Sett and S. N. Roy for the respondent

The judgment of the Court was as follows :—

The only point raised in this Second Appeal by the appellant (tenant) is, “whether an application u/s 17(2) of the West Bengal Premises Tenancy Act, 1956 can be disposed of on compromise between the parties and if any violation is committed of the terms of the compromise whether that amounts to default and in that event can the court take action u/s 17(3) of the Act striking out the defence against delivery of possession”.

2. The facts of the case are as follows : The plaintiff filed an Ejectment Suit against his tenant, the present appellant Prova Sundari Debi in respect of the suit premises u/s 13 of the West Bengal Premises Tenancy Act, 1956 on the ground of default in payment of rent u/s 13 of the Premises Tenancy Act. The defendant appeared and filed an application u/ss 17(2) & 17(2) (A) of the West Bengal Premises Tenancy Act challenging the rate of rent and denying the arrears of rent as alleged by the plaintiff. When the matter u/s 17(2) & 17(2) (A) came up for hearing the learned Munsif on a consideration of a joint petition of compromise filed by the parties, wherein the tenant admitted the rate of rent stated by the plaintiff in the plaint as correct and the arrear of rent was also admitted and further both the parties agreed that the rental amounts should be deposited month by month by the defendant within 15th of the following month for which it became due and that the arrears of rent would be deposited by instalment as mentioned therein within the 15th of the following month. It was also agreed by the parties that in case of default in payment of rental amounts and the arrears, the plaintiff would be entitled to file an application u/s 17(3) of the West Bengal Premises Tenancy Act. The learned Munsif disposed of the matter as per terms of compromise between the parties as mentioned above. Subsequently an application u/s 17(3) of the West Bengal Premises Tenancy Act was filed by the plaintiff (respondent) on the allegation that the defendant (tenant) did not deposit the rental amounts from the month of September, 1970 and the arrears of rent, within time and a prayer for striking out the defendant's defence against delivery of possession was made by the plaintiff. The application u/s 17(3) was heard by the learned Munsif and he found that the rent for November, 1970 and also the instalments in respect of the arrears of rent were not deposited within the 15th of the month of December, 1970 as per terms of the compromise petition but the same was deposited two days' later. The learned Munsif found that the defendant had committed default in making deposits. He, however, accepted the argument of the lawyer for the defendant that as the plaintiff withdrew the amount in default,

from the Court, the said act of the plaintiff amounted to waiver. Although it was pointed out to the learned Munsif that section 24 of the West Bengal Premises Tenancy Act regarding waiver by acceptance of the rent was not applicable as the ejectment suit was pending. The learned Munsif was of the view that as the plaintiff withdrew the amount which was in fact deposited beyond time, his conduct amounted to waiver, and he rejected the plaintiff's application u/s 17(3) of the WB PT Act, against the order of the learned Munsif rejecting the application u/s 17(3) of the landlord plaintiff, the present landlord respondent came up in revision u/s 115 of the Code of Civil Procedure, the same being Civil Rule No. 1473 of 1974. At the time of hearing of this Civil Revision case, it was argued by the Advocate for the tenant defendant that the compromise petition on the basis of which the application u/s 17(2) of the West Bengal Premises Tenancy Act was disposed of was a new agreement between the parties and hence an order u/s 17(2) could not be made on the basis of the same and, therefore there was no question of violation of the provisions of section 17(2) of the West Bengal Premises Tenancy Act, if there was any violation it was of the agreement between the parties. It was held by His Lordship Mr. Justice R. Bhattacharya that that was not so as "From the order sheet it appears that the learned Munsif considered the joint petition of compromise and obviously being satisfied with the terms which appeared to him as reasonable, he passed order that the application u/s 17(2) be disposed of in terms of the joint petition of compromise filled by the parties. There can be no doubt that the Court did apply its mind to the terms of the compromise petition and accepting them to be reasonable disposed of the defendant's application in terms of the joint application. I cannot say that there was no valid order u/s 17(2) passed by the Ld. Munsif. In this connection, it has been argued by Mr. Mukherjee that application u/s 27(2) (A) of the West Bengal Premises Tenancy Act is still pending. From the reading of the terms regarding the instalments, it is quite clear that practically speaking the terms of compromise covered both the applications u/ss 17(2) & 17(2) (A) of the West Bengal Premises Tenancy Act. The matter was disposed of by the learned Munsif and it was accepted by the parties that is why subsequently there was no objection from the defendant that the application u/s 17(2) (A) was pending. This argument of Mr. Mukherjee is not accepted". The question that requires decision in this Second Appeal was specifically agitated in revision before His Lordship Mr. Justice Bhattacharya as will appear from the extract given above of the judgment of His Lordship in that case.

3. Mr. Pramatha Mitra, learned Advocate, however, submitted that whether an application u/s 17(2) can be disposed of in terms of compromise is a question of jurisdiction and he submits that His Lordship Mr. Justice R. Bhattacharyya acted beyond his powers in holding that an

order u/s 17(2) could be made in terms of compromise between the parties to the suit and that further. His Lordship Mr. Justice Bhattacharya acted beyond jurisdiction in holding that since the terms of compromise had been violated the defence of the appellant against delivery of possession can be struck off. Accordingly the judgment of His Lordship Mr. Justice Bhattacharya being without jurisdiction is null and void and can be interfered with by me although I have only co-ordinate jurisdiction with His Lordship. This point raised in this appeal has been specifically decided by His Lordship by finding (a) that the order u/s 17(2) was a valid order based on terms of compromise between the parties, (b) Violation of the terms of compromise would entitle the learned Munsif to pass an order u/s 17(3) of the Act. On the basis of this decision of His Lordship the learned Munsif struck off the defence of the appellant against delivery of possession and decreed the eviction suit. On appeal the judgment and decree of the learned Munsif was affirmed. This decision by his Lordship Mr. Justice Bhattacharya is binding upon me. Since no appeal was preferred against the same, it has become final and the same question cannot be re-agitated in this Second Appeal.

4. Accordingly, I dismiss this appeal. There will be no order as to costs. The tenant defendant is granted six months' time to vacate the suit premises. The connected Rule is also discharged.

T.K.M.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee

Decision : July 14, 1978

Asraf Hossain

...

...Petitioner

Versus

Jahangir Hossain

...

...

...Opposite party*

West Bengal land Reforms Act (10 of 1955), Sec. 8,9,10, 14M—Application for pre-emption by Co-sharer tenant—Pre-emption allowed by Munsif—Where land transferred by order of pre-emption to pre-emptor—Total land of pre-emptor, if in excess of ceiling area—Whether Civil Court has jurisdiction to determine ceiling area—Application of Sec. 14M—Authorities under Chapter IIB—Whether such authorities have exclusive jurisdiction to determine ceiling area—Interpretation of different relevant sections of Chapter IIB.

The petitioner herein was a stranger purchaser of an undivided interest in the disputed raiyati holding and the pre-emptor opposite party was a co-sharer tenant. Both the courts below have upheld the claim of the opposite party to pre-empt the purchase made by the

*Civil Rule no. 1261 of 1977.

petitioner by his Kobala dated 5.4.65. The matter arises out of an application under section 8 of the West Bengal Land Reforms Act 1955,

HELD : Section 8(1) of the West Bengal Land Reforms Act, by using the expression "subject to Section 14M" has only clarified that a pre-emption by a co-sharer or a contiguous tenant under section 8 would be conditional upon a determination of his right under Chapter IIB of the Act to retain his land. Section 8(1) by using the said expression has dispelled all doubts on the question whether or not the land acquired by a raiyat under a pre-emption order would be exempted from the ceiling area under section 14M. But the learned Munsif while disposing a pre-emption application under section 9(1) of the Act, cannot work out the consequence of vesting of land upon the pre-emptor. In fact, section 14X has expressly excluded the Civil Courts' jurisdiction to decide matters coming under Chapter IIB. The authorities specified under Chapter IIB have the exclusive jurisdiction to determine the question of ceiling area and other allied matters in the manner prescribed in Chapter IIB.

Incidentally, it may be mentioned that under the West Bengal Land Reforms Act raiyati holdings or any portion or share thereof are transferable subject to the restrictions imposed by the Act. After the commencement of Chapter IIB, acquisition of land by transfer or otherwise by a raiyat who already owns land upto the ceiling area would not be totally null and void. In such a case section 14Y would be attracted. Section 14Y has put limitation on future acquisition of land by providing that the land in excess of the ceiling area shall vest in the State and all the provisions of Chapter IIB relating to ceiling on holding shall apply. Therefore in such a case the raiyat would be required to furnish a return under section 14T. He can opt to retain the land acquired by him after the commencement of Chapter IIB by including the said land amongst his retained lands in his return required to be filed under section 14T (1). The Revenue Officer on receipt of such a return would make the necessary determination, allow the raiyat to retain land upto the ceiling area and vest the surplus land in the State. The nature of enquiry and the kind of evidence required for determination of the question of pre-emption in a proceeding under section 8 are entirely different from those required for disposing of the questions arising out of a proceeding under section 14M. Further the law has not laid down one uniform ceiling area for all classes of raiyats. In each case the ceiling area is to be determined after considering the facts and circumstances of the case—whether he is adult, unmarried or whether he has a family and if so, the number of members of his family etc. Further the Revenue Officer and the State would not be bound by any adjudication regarding the ceiling area made in a proceeding under section 8 of the Act unless they are impleaded as parties. But the law does not require them to be joined as parties in proceedings under section 8. Therefore even if the

learned Munsif in disposing of an application under section 8 could arrive at a finding regarding the total area of land possessed by the pre-emptor, such determination would not be binding upon the authorities under Chapter IIB of the Act. Therefore, in case it is held that the learned Munsif can determine the ceiling area applicable to the pre-emptor, the same may result in bringing into existence contradictory and conflicting orders—one by the learned Munsif and another by the authority under Chapter IIB. So if the learned Munsif purports to make a determination of the ceiling area, he would transgress the limits of his jurisdiction (vide section 14X of the Act). The said section has excluded civil court's jurisdiction in respect of matters falling under Chapter IIB.

J. Islam and Satya Narayan Jas for the petitioner
Subhendu Sekhar Ray for the opposite party

Case referred to :—

(1) *Pasupati Mondal v. Subhrangshu Mondal and Others*, 1978 CHN 514

The judgment of the Court was as follows :—

This revisional application arises out of a proceeding under Section 8 of the West Bengal Land Reforms Act, 1955. Both courts of fact have found that the petitioner was a stranger purchaser of an undivided interest in the disputed raiyati holding and the pre-emptor opposite party was a co-sharer tenant. It is no longer disputed that the said application under Section 8 of the West Bengal Land Reforms Act was filed within time. Therefore, both the learned Munsif in the trial court and the learned Subordinate Judge in appeal have upheld the claim of the opposite party to pre-empt the purchase made by the petitioner by the kobala dated April 5, 1965.

2. Mr. J. Islam, learned advocate for the petitioner, has submitted that both the learned Munsif and the learned Subordinate Judge failed to discharge their statutory duties by not satisfying themselves as to whether the pre-emptor opposite party was already possessing lands up to the ceiling area prescribed by Section 14M of the West Bengal Land Reforms Act, 1955. Mr. Islam has further submitted that the court before allowing the application for pre-emption ought to have made an enquiry and arrive at a finding in this behalf. He has submitted that this Court may now remand the case. In my view, the petitioner is not entitled to pray for a remand of the case on the above ground. The learned Subordinate Judge in his appellate judgment has observed that this point was not taken either before the learned Munsif or in the memorandum of appeal filed in the appellate court. There was also no evidence in support of the submission made by the appellant at the time of the hearing of the appeal that the pre-emptor already owned lands up to the ceiling area mentioned in Section 14M of the West Bengal Land Reforms Act, 1955. The learned Subordinate Judge has further found that he had only 10 to 15 bighas of

agricultural land. The said evidence of the respondent was not challenged in cross-examination. In my view, the learned Subordinate Judge has rightly over-ruled the above contention of the present petitioner. Mr. Islam, learned advocate for the petitioner, has submitted that the Section 106 of the Evidence Act was applicable and that the said fact as regards the actual area of his lands being within the special knowledge of the pre-emptor, he was bound to prove the same. I have already pointed out that in this case the pre-emptor did depose before the Munsif that the total area of his lands was much below the ceiling. The petitioner neither cross-examined him nor did he adduce any rebutting evidence on the said point. The petitioner did not urge before the learned Munsif the said point. The learned Subordinate Judge in appeal on facts answered the said question regarding Section 14M of the West Bengal Land Reforms Act, 1955 in favour of the pre-emptor respondent. The petitioner cannot be allowed to urge in revision a question of fact for which he did not lay any foundation in the court of first instance. In the above view, sitting in revision, I am not prepared to remand the matter for a de-novo trial on the question as to whether or not the pre-emptor had land in excess of the ceiling prescribed by Section 14M of the West Bengal Land Reforms Act, 1955.

3. Mr. Islam, learned advocate for the petitioner, relied upon the decision of Salil Kumar Datta, J. in (1) *Pasupati Mondal v. Subhrangshu Mondal & Others*, reported in 1978 Calcutta High Court Notes 514. But the said decision is distinguishable on facts from the present case. It appears from the judgment of Salil Kumar Datta, J. that the transferee had taken a point before the learned Munsif that the pre-emption should not be allowed because it would be in violation of the provision of Section 14M of the West Bengal Land Reforms Act, 1955. Both parties had adduced evidence on this point. The learned Munsif found the said point against the transferee. At the time of the original hearing of the Civil Rule the said point regarding Section 14M was not taken. The petitioner in his review petition filed before Salil Kumar Datta, J. had, *inter-alia*, relied upon a *Nirupanpatra* in order to substantiate his allegation that in case the pre-emption was allowed the lands of the claimant for pre-emption would exceed the ceiling area as provided in Section 14M of the said Act. The petitioner in his review application had relied upon the certified copies of the Record of Rights in respect of the lands allegedly held by the claimants for pre-emption. Salil Kumar Datta, J. had reviewed his earlier order and had remitted back the case. I have already pointed out that the evidence of the pre-emptor that he owned 10 to 15 bighas of lands was not challenged by the present petitioner. Secondly, the petitioner neither in the lower appellate court nor in this court filed any documentary evidence in the shape of registered deeds, settlement records, proceedings of the Revenues Authorities to substantiate his

allegation that the pre-emptor opposite party already possessed lands in excess of the ceiling prescribed by Section 14M of the West Bengal Land Reforms Act, 1955.

4. I may further observe that I am not inclined to accept the submission of the learned advocate for the petitioner regarding the scope and effect of the expression 'subject to Section 14M' in Section 8(1) of the West Bengal Land Reforms Act, 1955.

5. Section 8(1) of the West Bengal Land Reforms Act specifies the classes of persons who may apply for pre-emption in case of a portion or share of holding of a raiyat is transferred to a person other than a co-sharer of a holding. Sub-section (1) of Sec. 8 further qualifies that a co-sharer tenant or contiguous tenant may apply for transfer of the said portion or share of the holding "subject to the limit mentioned in Section 14M" on deposit of the consideration money together with a further sum of 10% of that amount. It is significant that Section 9(1) of the West Bengal Land Reforms Act, 1955 which prescribes the manner in which the learned Munsif shall dispose of an application under Section 8 or Section 10 which mentions the consequences of allowing a pre-emption application, make no reference to the provisions of section 14M of the West Bengal Land Reforms Act.

6. We may now consider the meaning of the expression 'subject to Section 14M' in Section 8(1). This qualifies the nature of the right which the pre-emptor would acquire over the share or portion of a holding-pre-empted by him. Section 8(1) in substance means that when a portion or share of the holding in question is transferred to a stranger, the pre-emptor may apply that the said portion or share be transferred to him subject to the provisions of Section 14M of the West Bengal Land Reforms Act. Thus the vesting of land upon a co-sharer or a Contiguous tenant in terms of an order allowing his application for pre-emption would attract the provisions of Section 14M of the Act.

7. The Chapter IIB of the West Bengal Land Reforms Act, 1955 contains provisions relating to ceiling on holding and ceiling area has been defined as 'the extent of land which a raiyat shall be entitled to own' (vide-Section 14K(a). Section 14J provides that the provisions of Chapter IIB shall override provisions contained elsewhere in the West Bengal Land Reforms Act and also the provisions of any other law. Section 14X has specifically barred the jurisdiction of Civil Courts to determine any matter which is by or under the Chapter IIB required to be decided or dealt with by the Revenue Officer or the authority specified in Chapter IIB. The orders passed in the proceedings under the said Chapter shall not be called in question in civil court. Thus the provisions of Chapter IIB require that all questions relating to the ceiling specified under Section 14M shall be determined only by the authorities

mentioned in the different provisions of Chapter IIB. There is also exclusion of jurisdiction of civil court in respect of these questions.

8. After the commencement of the provisions of Chapter IIB, any land owned by a raiyat in excess of "the ceiling area" in terms of Section 14S vested in the State. Every raiyat owning land in excess of the ceiling area under sec. 14T was under a duty to furnish within the specified time a return of the lands which he proposed to retain within the ceiling area applicable to him under section 14M. On receipt of a return the Revenue Officer under Section 14T(3) would determine the extent of land which is to vest. The sub-section (3A) of section 14T gives power to the Revenue Officer to revise an order made under Section 14T(3). If after the commencement of Chapter IIB any raiyat acquires any land whether by transfer inheritance or otherwise and such land together with the land owned by him exceeds the ceiling area under Section 14M, the area in excess of the ceiling area in terms of Section 14Y would vest in the State and all the provisions of Chapter IIB relating to ceiling on holding shall apply to such land. The expression 'acquired' in Section 14Y has a very wide meaning. Acquisition may be by a voluntary or an involuntary act, by a private treaty or under orders of a court or authority. Mode of acquisition may be by transfer *inter vivos*, inheritance or devolution in any manner. This Section 14Y has provided that Chapter IIB would apply in case a raiyat in any made acquires land after Chapter IIB had come into force. When a land would be transferred to a raiyat after the Chapter IIB had come into force, the area of the transferred land would be taken into consideration for determination by the appropriate authority under Chapter IIB of the extent of the land such transferee shall be entitled to own and possess and how much land as surplus would vest. A pre-emption is a right to preferential purchase. When the order is made allowing the application under Section 8(1), the right, title and interest of the transferor raiyat, of his transferee and also of his subsequent transferee would vest in the pre-emptor in the manner indicated in Section 10 of the West Bengal Land Reforms Act. Thus an order passed under Section 9 results in transfer/devolution of the interests specified in Section 10. Under Section 8, after a transfer of a share or portion of a raiyati holding is made to a stranger purchaser, a co-sharer or a contiguous tenant may purchase the said transferred share or portion in the manner laid down in Sections 8 and 9 of the West Bengal Land Reforms Act. The effect of allowing a pre-emption application would be that the pre-emptor who would acquire the share or portion in question under Section 14Y, the said pre-emption would be subject to the provisions of Chapter IIB. Thus Section 8(1) by using the expression "subject to Section 14M" has only clarified that a pre-emption by a co-sharer or a contiguous tenant under Section 8 would be conditional upon a

determination of his right under Chapter IIB of the West Bengal Land Reforms Act to retain the said land. The Section 8(1) of the West Bengal Land Reforms Act, 1955 by using the expression 'subject to Section 14M' has dispelled all doubts on the question whether or not land acquired by a raiyat under a pre-emption order would be exempted from the ceiling area under Section 14M. But the learned Munsif while disposing under Section 9(1) of the West Bengal Land Reforms Act a pre-emption application, cannot work out the consequence of vesting of land upon the pre-emptor. In fact, Section 14X has expressly excluded civil court's jurisdiction to decide matters coming under Chapter IIB. The authorities specified under Chapter IIB have the exclusive jurisdiction to determine the question of ceiling area and other allied matters in the manner prescribed in the said Chapter IIB.

9. It may be also pointed out that under the West Bengal Land Reforms Act raiyati holdings or any portion or share thereof are transferable subject to the restrictions imposed by the Act. After the commencement of Chapter IIB acquisition of land by transfer or otherwise by a raiyat who already owns land up to the ceiling area would not be totally null and void. In such a case the provisions of Section 14Y would apply. I have already pointed out that Section 14Y has put limitations on future acquisition of land by providing that the land in excess of the ceiling area shall vest in the State and all the provisions of Chapter IIB relating to ceiling on holding shall apply. Therefore, in such a case the raiyat would be required to furnish a return under Section 14T. He can opt to retain the land acquired by him after the commencement of Chapter IIB by including the said land among his retained lands in his return required to be filed under Section 14T (1). The Revenue Officer on the receipt of such a return would make the necessary determination, allow the raiyat to retain land up to the ceiling area and vest the surplus land in the State.

10. If any other interpretation is put on Section 8(1), it would lead to various inconsistencies. I have already pointed out that the learned Munsif exercising his powers under Sections 8 and 9 cannot usurp the functions of the authorities under Chapter IIB. The nature of the enquiry and the kind of evidence required in a proceeding under Section 8 for determination of the question of pre-emption are entirely different from those required for disposing of the questions arising under Section 14M. Further, law does not lay down one uniform ceiling area for all classes of raiyats. In each case the ceiling area is to be determined after taking into consideration several facts and circumstances whether he is adult, unmarried or whether he has a family and if so, the number of members of his family etc. Further, the Revenue Officer and the State would not be bound by any adjudication regarding the ceiling area made in a proceeding under Section 8 of the West Bengal Land Reforms Act unless they were impleaded as parties. But Law does not require

of the Munsif is a court of limited jurisdiction with the meaning of Explanation VIII.

HELD : It is true that the pecuniary jurisdiction of the Munsif's Court is limited and that of the court of the Subordinate Judge is unlimited. But can it be said that the expression 'a court of limited jurisdiction' refers to a court of limited pecuniary jurisdiction. If Explanation VIII is interpreted without reference to section II of the Code, it may be said that a court limited pecuniary jurisdiction is a court of limited jurisdiction. An Explanation to a particular section is primarily meant for explaining the section itself. So in order to ascertain the true meaning of the Explanation VIII, it has to be read along with the provisions of the section and not dehors it. That being so, it appears that one of the conditions for applicability of section II of the Code is that the court in which the former suit was instituted must be competent to try the subsequent suit. If the former court is unable to try the subsequent suit as it is beyond its pecuniary jurisdiction the decision of the former court will not be resjudicata in the subsequent suit. If the legislature had really intended to remove the condition relating to the competency of the former court, in that case, it would have removed the same from the section itself. In the face of the provisions of section II retaining the said condition for the applicability of resjudicata that the former suit must be competent to try the subsequent suit, it is rather difficult to accept the interpretation of Explanation VIII as suggested on behalf of the appellant.

What then is the meaning of the expression "a court of limited jurisdiction". Courts of limited jurisdiction are courts other than the Ordinary Civil Courts. By enacting Explanation VIII, the legislature brought the decisions of such "Other Courts" within the purview of section II. In other words, it is not necessary now to apply the general principles of resjudicata, but in view of Explanation VIII, the decisions of the courts of limited jurisdiction or exclusive jurisdiction will operate as resjudicata in subsequent suits under section II of the Code. The general principles of resjudicata would apply where the former proceeding is not a suit but section II of the Code will apply where the two proceedings are suits. Under Explanation VIII, the provisions of section II will apply to the subsequent suit when an issue has been heard and finally decided by a court of limited jurisdiction in a former proceeding. There is a clear indication in that regard in Explanation VIII, for it does not say that the decision of an issue by a court of limited jurisdiction has to be made in a former suit. This is also an indication that Explanation VIII does not contemplate that the two proceedings must be suits, but that decision has been given in a former proceeding by a court of limited jurisdiction and not in a former suit. That excludes any argument that Explanation VIII has removed the condition of competency of the former

- court finally deciding a suit or issue to try the subsequent suit. So where both the former and subsequent proceedings are suits, to invoke the bar of *resjudicata* the condition as to competency of the former court to try the subsequent suit must be fulfilled. If the former court is not competent to try the subsequent suit for want of pecuniary jurisdiction, section II will not apply. In these circumstances, it is not possible to accept the contention that the finding of the learned Munsif in the former suit that there was a previous partition operates as *resjudicata* in the present suit for partition instituted in the court of the Subordinate Judge, for the learned Munsif is not competent to try the present suit.

Case referred to :—

(1) *Mst. Gulab Bai v. Manphool Bai*, AIR 1962 SC 214

Pramatha Nath Palit and Samarendra Kumar Dutta ... for the Appellant
No one ... for the Respondents

The judgment of the Court was as follows :—

Dutt, J. : This appeal is at the instance of the defendant and it arises out of a suit for partition. The appeal involves the interpretation of the New Explanation VIII which has been added to section 11 of the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act, 1976.

2. The plaintiffs instituted the suit claiming partition by metes and bounds of their half share in the suit property. The principal defence of the defendant was that prior to this suit he had instituted a suit against the plaintiffs, being Title Suit No 69 of 1961, in the First Court of the Munsif at Rampurhat, for a declaration of his title to 10 acre of land appertaining to CS Plot. No. 1183. In that suit, it was *inter-alia* contended by the defendant that there was a previous partition. The said suit was decreed on a finding that there was an amicable partition of the suit property. It was urged by the defendant that the finding of the learned Munsif in the said Title Suit No. 69 of 1961 would operate as *resjudicata* in the present suit.

3. The learned Subordinate Judge overruled the contention of the defendant that the finding in the earlier suit operated as *res-judicata* in the present suit, for he took the view that the Court of the Munsif in which the earlier suit was instituted was not competent to try the present suit. He relied on a decision of the Supreme Court in (1) *Mst. Gulab Bai and others v. Manpool Bai*, AIR 1962 SC 214. On the merits of the case, the learned Subordinate Judge held that there was no previous partition as though the plaintiffs had a half share and the defendant had the other half, the defendant was in possession of 15 or 16 bighas of land and the plaintiffs were in possession of 7 or 8 bighas of land. The defence plea of previous partition was disbelieved by the learned Subordinate Judge. Accordingly, the learned Subordinate Judge decreed the suit in a preliminary form declaring the plaintiffs' half share in the suit property. On

appeal by the defendant against the judgment and decree of the learned Subordinate Judge, the lower appellate court also took the same view and dismissed the appeal. Hence this second appeal.

4. The principal question is, therefore, whether the present suit is barred by *res judicata*. One of the conditions that must be fulfilled before the doctrine of *res judicata* as embodied in section 11 of the Code of Civil Procedure can be invoked is that the Court in which the former suit was instituted must be competent to try the subsequent suit. In the instant case, the former suit was instituted by the defendant in the Court of the Munsif, but the present suit has been instituted by the plaintiffs in the Court of the Subordinate Judge. It is true that in the former suit it was held by the learned Munsif that there was a previous partition of the suit property, but the learned Munsif not being competent to try the present suit, it cannot be said that the said finding operates as *res judicata* in the present suit. A similar question was raised before the Supreme Court in *Golab Bai's* case referred to above and the Supreme Court, after a review of judicial decisions on the point, held that if the trial Court was not competent to try the subsequent suit the question of *res judicata* would not arise.

5. Mr. Samarendra Kumar Dutta, learned Advocate appearing on behalf of the defendant appellant has urged that in view of the new Explanation VIII to section 11, the question of competency of former court to try the subsequent suit has become irrelevant. The new Explanation VIII provides as follows :

“Explanation VIII—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

It is argued by Mr. Dutta that in view of Explanation VIII, although the Court of the Munsif in the former suit was a Court of limited jurisdiction, its decision would operate as *res judicata* in the present suit. The question is whether the Court of the Munsif is a Court of limited jurisdiction within the meaning of Explanation VIII. There can be no doubt that the pecuniary jurisdiction of the Court of the Munsif is limited and that of the Court of Subordinate Judge is unlimited. But can it be said that the expression “a Court of limited jurisdiction” refers to a Court of limited pecuniary jurisdiction? If we are to interpret Explanation VIII without referring to section 11, it may be said that a Court of limited pecuniary jurisdiction is a Court of limited jurisdiction. An explanation to a section is primarily meant for explaining the section itself. In our view, in order to ascertain the true meaning of the Explanation VIII, it has to be read along with the provision of the Section and not de hors

it. It has been already stated that one of the conditions for the applicability of section 11 is that the Court in which the former suit was instituted must be competent to try the subsequent suit. If the former Court is unable to try the subsequent suit as it is beyond its pecuniary jurisdiction, the decision of the former court will not be *res judicata* in the subsequent suit. If the legislature had really intended to remove the condition relating to the competency of the former Court, in that case, it would have removed the same from the section itself. In the face of the provision of section 11 retaining the said condition for the applicability of *res judicata*, that the former Court must be competent to try the subsequent suit, it is difficult for us to accept the interpretation of Explanation VIII as suggested on behalf of the appellant.

6. What is then the meaning of the expression "a Court of limited jurisdiction"? In our view, Courts of limited jurisdiction are Courts other than the ordinary Civil Courts. These Courts are Revenue Courts, Land Acquisition Courts, Administrative Courts, Insolvency Courts, Guardianship Courts, Probate Courts etc. These Courts are to try certain specific matters and in that sense they may be said to be Courts of limited jurisdiction. These Courts are also Courts of exclusive jurisdiction in respect of the matters they are to try. The decisions of such Courts operated as *res judicata* in subsequent suits not by virtue of section 11 but on the general principles of *res judicata*. By enacting Explanation VIII, the legislature brought the decisions of such Courts within the per-view of section 11. In other words, it is not necessary now to apply the general principles of *res judicata*, but in view of Explanation VIII the decisions of the Courts of limited jurisdiction or exclusive jurisdiction will operate as *res judicata* in subsequent suits under section 11. The general principles of *res judicata* would apply where the former proceeding is not a suit but section 11 would only apply where the two proceedings are suits. Under Explanation VIII, the provision of section 11 will apply to the subsequent suit when an issue has been heard and finally decided by a Court of limited jurisdiction in a former proceeding. There is a clear indication in that regard in Explanation VIII, for it does not say that the decision of an issue by a Court of limited jurisdiction has to be made in a former suit. This is also an indication that Explanation VIII does not contemplate that the two proceedings must be suits, but as stated already, the decision has been given in a former proceeding by a Court of limited jurisdiction and not in a former suit. This excludes any argument that Explanation VIII has removed the condition of competency of the former Court finally deciding a suit or issue to try the subsequent suit. So where both the former and the subsequent proceedings are suits, to invoke the bar of *res judicata* the condition as to the competency of the former Court to try the subsequent suit must be fulfilled. If the former Court is not

competent to try the subsequent suit for want of pecuniary jurisdiction, section 11 will not apply. In these circumstances, we are unable to accept the contention made on behalf of the appellant that the finding of the learned Munsif in the former suit that there was a previous partition operates as *res judicata* in the present suit for partition instituted in the Court of the Subordinate Judge, for the learned Munsif is not competent to try the present suit.

7. It appears that the plaintiffs transferred a portion of the suit property to one Chatur who was not made a party in the suit. It has been directed by the lower appellate court that the said transferee shall be added as a party at the time of the passing of the final decree, so that the allotments may be made in his presence. Further, it has been directed that, if possible, the Commissioner for Partition may allot the land specifically sold to the transferee, if equities permit the same, but if equities would not permit such allotment, the transferee may get land of equal value from the allotment of his transferor-cosharer. We do not think that non-joinder of Chatur is fatal to the suit. The direction given by the lower appellate court is quite in accordance with justice and equity. In these circumstances, we are unable to accept the contention of the appellant that the suit should be dismissed on the ground of non-joinder of Chatur. No other point has been urged in this appeal.

8 For the reasons aforesaid, the appeal is dismissed, but as the respondents have not appeared, there will be no order for costs.

Chakravorti, J. : I agree.

T.K.M.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Sudhamay Basu

Decision : May 23, 1978

Kalipada Ghosh

...

...

...Petitioner

Versus

Dulal Chandra Ghosh

...

...

...Opposite Party*

West Bengal Land Reforms Act (10 of 1955), Secs. 8 & 14M—Pre-emption—Tank and its bank—Whether tank is agricultural land—Right to pre-empt—Whether court can grant prayer for pre-emption without taking into consideration the ceiling area as provided in sec. 14M—Claim of contiguous tenant for pre-emption

Three plots of land were sold to four different persons. The opposite party was the owner of adjoining land and he applied for pre-emption. The petitioner resisted such a claim for pre-emption on the ground that the disputed land was non-agricultural land, being mainly a tank and its bank. The Trial Court did not allow the claim for pre-emption on the

*C. R. No. 3589 of 1976.

finding that the land in question was non-agricultural land and the claimant was a big raiyat against whom a Big Raiyat case had been started. On appeal, the decision of the trial court was reversed and the claim for pre-emption was allowed. Hence this Rule.

HELD: 'Land' as defined in section 2(7) of the West Bengal Land Reforms Act 1955 means 'agricultural land' but does not include tank. If therefore, the 'land' means only agricultural land, then the expression 'holding' within the meaning of the Act cannot but be referred to as agricultural land'. Under the said Act the right to retain appears to relate to raiyati land unlike the provisions of the West Bengal Estates Acquisition Act which deal with land of various kinds including homestead, non-agricultural land etc. The subject matter of the instant pre-emption being mainly tank, it is non-agricultural land

The contention that the right of pre-emption being attached to land and such a right being a vested right can not be divested at the stage of hearing because of the amendment of the definition of expression 'land' in section 2(7) is not acceptable. Even though a tank was not excluded from the agricultural land when the application for pre-emption was made, by reason of the amendment, a tank ceased to be land within the meaning of Section 2(7) for the Act at the hearing of the application for pre-emption. The right of the pre-emptor must continue till the disposal of the pre-emption matter.

The claim for pre-emption is subject to the restrictions imposed by section 14M of the Act. The Civil Court without any reference to the ceiling area, cannot allow pre-emption. But as the Civil Court has no jurisdiction to determine the ceiling area it cannot therefore allow the claim if preemption where the question of determination of ceiling area is interlinked.

Cases referred to :—

- (1) *Fakir Chandra Chakraborty v. L. K. Jha*, 74 CWN 946.
 - (2) *B. K. Saha v. Revenue Officer*, 76 CWN 367.
 - (3) *Commr. of I. T. W. B. v. Benoy Kr. Saha Roy*, AIR 1957 SC 768.
 - (4) *Tea Estates India (P) Ltd. v. Commr. of Wealth Tax, W. B. Calcutta*, 69 CWN 428.
 - (5) *Audh Behari Singh v. Gajadhar Jaipuria & Ors.*, AIR 1954 SC 417.
 - (6) *Kanailal Jana v. Mrityunjay Patra*, 1977 CHN 577.
 - (7) *Bhagaban Das v. Chetram*, AIR 1971 SC 369.
 - (8) *Hans Nath v. Ragho Prasad Singh*, 59 IA 138.
 - (9) *Thakur Madho Singh v. Kinner*, AIR 1941 Lahore 433.
 - (10) *Fizor Mohammed v. Firoz Ali Khan*, AIR 1944 Lahore 172
 - (11) *Ramji Lal v. State of Punjab*, AIR 1966 Punjab 374.
 - (12) *Thakurrai v. Bhagat Rai*, AIR 1961 Patna 285
 - (13) *Azimuiddin v. Hercules Insurance Company*, AIR 1953 Bom. 61
 - (14) *Krishna Pada Biswas v. Lisha Rani Naskar*, 78 CWN 779
- Ranjit Kr. Banerjee and Asoke Kr. Banerjee* ... for the Petitioner
S. C. Dasgupta and J. M. De ... for the Opposite Party

The judgment of the Court was as follows :—

This Rule was obtained against an order dated the 18th of August, 1976 passed by the learned Additional District Judge, Burdwan in Misc. Appeal no 55,56,57 and 58 of 75 (heard analogously) reversing an order dated the 26th of April, 1975 passed by the learned Munsif, Kalna in Pre-emption case no. 57,58,59 and 61 of 72.

2. The four miscellaneous cases (nos. 57, 58, 59 and 61 of 72) before the learned Munsif of Kalna with regard to pre-emption were originally filed before the S.L.R.O. The property in dispute forms part of plot nos. 317, 318 and 330 of *mouja* Jharbati appertaining to *khatian* no. 346. There were four sale deeds executed on the same day by the same person but to different persons. The opposite party no. 1 claimed right of pre-emption as he had lands adjoining to plot no. 318 which is a tank comprising an area of 2.09 decimal, plot no. 317 which is a bank of the said tank and another area of .63 decimals and plot no. 313 which is also a bank of a tank with an area of .80 decimal when the owners of the aforesaid plots sold their interests to four different persons which were registered in four different sale deeds on the same day. Thus the opposite party's claim was preferred on account of vicinage. The present petitioner resisted the claim for pre-emption on the ground *inter alia* that the property in dispute was non-agricultural land as they were mainly tank and bank of the tank. The learned Munsif disallowed the claim on the ground that the land was non-agricultural and that the claimant was a big raiyat against whom a B.R. case had been started. The learned appellate Court noted that a Civil Rule No. 440 of 69 was obtained against big raiyat case and this court ultimately directed the pre-emptor to submit 'B' Form along with some other directions. On the said circumstances, the appellate Court thought that it could not be conclusively held that the pre-emptor was having land above the ceiling. The learned appellate Court also noted that the land was 'settled with a raiyat'. He held that "actual use of the land for agricultural purpose was not a condition precedent" to enforce the right of pre-emption. The court also thought that under S. 8(1) of the West Bengal Land Reforms Act the nature of the land transferred was not be taken into consideration. "The entire property held by the raiyat" was to be treated as a unit. On those considerations he allowed the claim for pre-emption and the same is challenged in this Rule.

3. Mr. Ranjit Kumar Banerjee, appearing in support of the Rule contended that as the subject-matter of conveyance was only a tank and its bank, comprising 3.52 acres (2.09+.63+.80) it would not be treated as agricultural land. Section 2(7) of the West Bengal Land Reforms Act provides that 'land' means agricultural land. Moreover, by a later amendment firstly by the President's Act 3 of 1971 and thereafter by the West Bengal Land Reforms (Amendment) Act, 1972 (Act XII of 72) it was provided that land does not include a tank. In the case of (1)

Fakir Chandra Chakraborty v. L. K. Jha, reported in 74 CWN 946 a Division Bench of this court held that the tank would come within the definition of non-agricultural land as contained in S. 2(3) of the West Bengal Estates Acquisition Act. In a later case (2) *B. K. Saha v. Revenue Officer*, reported in 76 CWN 367 it was also held that as a tank was not used ordinarily for the purpose of agriculture or horticulture it is not agricultural land; even though it may be used for drinking purpose or other purposes including irrigation. In this connection Mr. Banerjee drew the attention of the court to the R. S. Record in which the tank was referred to be meant for Shecher Janya (for the purpose of irrigation). Even so the tank can be regarded as nothing other than non-agricultural land by virtue of the amended provision and the said decision in 76 CWN 367. The expression 'agriculture' came to be considered at some length by the Supreme Court in a decision reported in (3) AIR 1957 SC 768, *Commissioner of I. T. West Bengal v. Benoy Kr. Saha Roy*). In substance it held that 'agriculture' in its root sense means *ager*, a field and culture-cultivation, cultivation of field which of course implies expenditure of human skill and labour upon land. The term, however, has acquired significance and that is to be found in the various dictionary meanings as ascribed to it which use it both in narrow sense of the cultivation of the field and the wider sense of comprising all activities in relation to the land including horticulture, forestry, breeding and rearing of livestock, dairying, butter and cheese-making, husbandry etc. Following the aforesaid decision of the Supreme Court the expression "agriculture" was given wider connotation in another decision of this court reported in (4) 69 CWN 428 (*Tea Estates India (P) Ltd. v. Commissioner of Wealth Tax, W.B. Calcutta*).

4. Mr. Dasgupta, opposing the Rule, however, contended that pre-emption was an incident of property as was held by the Supreme Court in (5) AIR 1954 SC 417 (*Audh Behari Singh v. Gajadhar Jaipuria & Ors.*) The right which was created when transfer was made was not violative of fundamental right, The right remained with land. As it is not a mere personal right, the right of pre-emption which appertain to the owner of the vicinage should continue. In this case, Mr. Dasgupta argued, if the right of pre-emption was there at the inception why should it be lost in 1971 by virtue of the amendment? The amendment to S. 2(7) again was to take effect retrospectively but upto 12.2.1971. The retrospectivity does not extend further back. The right of pre-emption being a substantive and vested right it could not be divested. Mr. Dasgupta referred to S. 8 and S. 8(A) of the Bengal General Clauses Act in this regard. He further argued that S. 8 of the W.B.L.R. Act speaks only of a 'holding'. Under S. 2(6) of the Land Reforms Act 'holding' means a land or lands held by a raiyat and treated as a unit for assessment of the revenue. Now the subject matters of this case were three dags 318, 317 and 330 of the *khatian*

346 or the jama. In the holding there are other properties. What S. 8 speaks of is "portions or share" of holding. In the circumstances since the pre-emption application related to a share of the holding it did not matter if a part of the holding comprised agricultural land, a part non-agricultural land or tank. According to Mr. Dasgupta what was of importance is 'holding'. That was quite different from land. The right does not depend on the land which is defined in S. 2(7). It depends on the entire holding.

5. It would thus appear that Mr. Dasgupta would lay emphasis on the word "holding" which is referred to in S. 8 irrespective of the definition elsewhere. But on scrutiny it is difficult to accept the argument. Even a holding' under S. 2(6) of the W.B.L.R. Act means "land or lands held by raiyat and treated as a unit for assessment of revenue". "Land" again under S. 2(7) means 'agricultural land and by dint of the amendment excludes tank from 12th of February 1971. If, therefore, 'land' can only mean agricultural land under the West Bengal Land Reforms Act 'holding' in terms of the Act cannot but be referred to "agricultural land". Under the West Bengal Land Reforms Act retention seems only to relate to *raiya* land. Unlike the Estates Acquisition Act which dealt with lands of various kinds including homestead non-agricultural land etc. the West Bengal Land Reforms Act is confined only to agricultural land. Unlike the ceiling prescribed in Estates Acquisition Act the new ceiling depends on members of family and other consideration dealt with under S. 14M. In a decision (6) *Kanailal Jana v. Mrityunjay Patra*, reported in 1977 CHN 577 Chanda, J. also held that by virtue of the amendment tank lost its character of land and therefore there could not be any claim for pre-emption in respect of a tank. He also rejected the submission that the tank and its bank constituted one holding and could not be split up and the water portion distinguished from the dry portion. In that case the bank were held to be necessary for the use of the tank and could not be regarded as agricultural land. I am therefore, inclined to accept the contention of Mr. Banerjee and hold that the subject matter of pre-emption being mainly a tank, (even though meant for irrigation purpose) it is non-agricultural land.

6. Again, in (7) *Bhagaban Das v. Chetram*, reported in AIR 1971 SC 369 the Supreme Court held that the pre-emptor, in order to succeed must have the right to pre-empt not only at the time of sale of the land by the landlord but also at the time of the institution of the suit for pre-emption and also at the time of passing of the decree in the suit by the trial court. The Supreme Court relied in this connection on the cases of (8) *Hans Nath v. Ragho Prasad Singh*, reported in 59 Indian Appeal 138, (9) *Thakur Madho Singh v. Kinner*, reported in AIR 1941 Lahore 433 and (10) *Fizor Mohhamed v. Firoz Ali Khan*, reported

in, AIR 1944 Lahore 172. It also relied on the Full Bench decision of the Punjab High Court in (11) AIR 1966 Punjab 374 (*Ramji Lal v. State of Punjab*) which held that the rule that the pre-emptor must maintain his qualification to pre-emption upto the date of the decree was recognised as well settled. These series of judgments seem to support Mr. Banerjee's other contention that at the time of the judgment the pre-emptor did not retain any right to pre-empt. Even though a tank was not excluded from agricultural land when the application for pre-emption was made, by dint of the amendment already referred to above a tank ceased to be land within the meaning of S. 2(7) of the W.B.L.R. Act at the time of hearing of the case and the passing of the judgment.

7. In view of the uniform decision of the Supreme Court and the Privy Council that the right of pre-emptor must continue till the passing of the decree or the judgment it is difficult to uphold the contention of Mr. Das Gupta that the right of pre-emption being attached to land and the same right being a vested one could not be divested at the time of hearing of the case by dint of an amendment of the legislature. It is true that in most of the cases the facts were that the pre-emptor did not continue to hold the tenancy at the time of passing of the decree whereas in the present case there was no such change in tenancy. There was only a change in the situation due to an act of the legislature. But the formulation of the law by the Privy Council, Supreme Court and the other decisions, in the rigid form which has been accepted as settled, for a long time, seems to exclude the possibility of variation as suggested by Mr. Dasgupta. Generalisations like ready-made garments, hardly fit at all points. Formulation of a general principle has its advantages. It may be applied readily in a specified field yet its difficulty is that it may be unable to meet the requirement of all individual cases. This deficiency however, results from the character of law itself in failing to meet the infinite variety of things and circumstances by a general and universal rule. In any event there seems to be no escape from the binding nature of the decisions. I, therefore, accept this contention of Mr. Banerjee as well.

8. It was, further contended by Mr. Banerjee that the claim for pre-emption could only succeed provided the transfer of the land in question would not exceed the limit mentioned in S. 14(M) of the W.B.L.R. Act, Section 8 of the Act itself makes it clear that the pre-emptor's right is 'subject to the limit mentioned in S. 14M'. Mr. Banerjee drew the attention of the court to an order of the High Court passed in Civil Rule No. 440(W) of 1969 in relation to a big raiyat case in which this court directed the pre-emptor to submit a return in B form. The learned appellate court thought that it could not be held conclusively from the above circumstance that the pre-emptor was having land above the ceiling. Mr. Banerjee criticised this approach of the court to be a wrong one. The said court

itself records elsewhere, referring to the cross-examination of the pre-emptor himself, that he got a total area of 50 to 55 bighas. Mr. Banerjee commented that at the time of making admission possibly the pre-emptor was thinking in terms of a ceiling under the Estate Acquisition Act which is quite different from the ceiling under the W.B.L.R. Act. Mr. Banerjee also drew the attention of the court to the submission of the lawyer on behalf of the pre-emptor before the learned Munsif that when the question of retention will arise the pre-emptor would treat "the case lands to be non-agricultural".

9. Mr. Dasgupta, however, argued that the phrase 'subject to the limit mentioned in S. 14(M)' in S. 8 of the W.B.L.R. Act only means that the court was entitled to pass an order with the qualification that the same will be subject to the limit of S. 14(M). It would be the jurisdiction of another forum to consider that aspect viz, the question of ceiling. According to Mr. Dasgupta considerations of ceiling was not a condition precedent to the application of the provisions of section 8.

10. It is however, difficult to accept the said contention. The scheme of the Act shows that under S. 14(7) it would be the duty of the *raiyat* to furnish return to the Revenue Officer revealing which land he proposes to retain within the ceiling area. The Revenue Officer on receipt of the return or on his own notion would determine the extent of land which is to vest in the State under S. 14(S) and take possession of such land. Section 14 L) specifically holds that no *raiyat* is to hold land in excess of the ceiling area. In view of the said provisions it cannot be held that the court without regard to the provision of ceiling would allow pre-emption. If a court allows an order for pre-emption under S. 8 irrespective of the consideration of ceiling and leaves it to the future to be determined under S. 14(Y) in that case the court may happen to allow the pre-emptor to hold land beyond the ceiling, even if temporarily. A Court can hardly make such an order violative of the express provision of the statute. Moreover in that case the decree of the court would be in the nature of preliminary decree to have final effect in future. The provision of S. 14(Y) namely, that if a *raiyat* acquires any land in future the area in excess of ceiling will vest in the State, on which Mr. Dasgupta sought to rely, cannot thus be helpful to him. If S. 14(Y) alone was to take care of excess land under all circumstances then, as Mr. Banerjee pointed out, what was the necessity of incorporating S. 14(M)? It is to be borne in mind that the right of pre-emption after all is a weak right. By exercising the same the pre-emptor seeks to invade the contractual right of others. There is, therefore, no strong equity in his favour which would induce the court to try to remove the obstacles in this way, if possible, by exercising its discretion.

11. Another point to be noted in this connection is that even if the court holds that the phrase "subject to the limit mentioned in S. 14M" of

the WBLR Act is a condition precedent, in view of the provisions of Or. 6 r. 6 and Or. 8 r. 2 of the Code of Civil Procedure it is incumbent upon those who oppose pre-emption to specifically plead that the ceiling would be exceeded if pre-emption is allowed. In the present case the question was gone into by the courts below and there was no contention raised about the point not being raised in the pleadings. In the absence of any pleadings by the pre-emptee it may be implied that the condition precedent was fulfilled. Reference in this connection may be made to the cases of (12) *Thakurrai v. Bhagat Rai* reported in AIR 1961 Patna 285 and (13) *Azimuddin v. Hercules Insurance Company* reported in AIR 1953 Bom. 61 In the last case it was held by Tendolker, J. that Order 6, Rule 6, CPC makes it quite plain that an averment of the performance of any condition precedent shall be implied in any pleading and it is for the party who wishes to contest the fact of performance to plead so distinctly and specifically.

12. The last point. Mr. Banerjee argued, was that the entire property being transferred pre-emption in terms of S. 8. could not take place inasmuch as the section contemplates only cases where the portion or share of a holding of a *raiyat* is transferred to a person other than co-sharer. The case of (14) *Krishnapada Biswas v. Lisha Rani Naskar* reported in 78 CWN 779 was cited in this connection. Mr. Dasgupta pointed out that the point was never raised in the courts below. Moreover it involves question of fact which could not be raised in revision. There is substance in the contention of Mr. Dasgupta. The nature of the entire plot and the different portions sold were never scrutinised from this point of view to ascertain if, in fact, the entirety of the plot was sold. Moreover it may be pointed out that in the case of 78 CWN 779 facts were different. Some pertinent questions arise in this connection. The legislature obviously contemplates pre-emption both by the co sharer and neighbours. If in a plot where A, B, C and D are the owners A sells his properties to an outsider there is no doubt that B, C and D may apply for pre-emption. But supposing in a case where A owns the entire plot and sells the entirety why cannot the neighbour pre-empt? It is not, however, necessary to go into further details of this aspect of the matter as I have already noted earlier that the questions being a mixed one of fact and law cannot be raised here.

13. However, in view of my findings on the other points in favour of Mr. Banerjee the petition succeeds and the Rule is made absolute. There will be no order as to costs.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Nirmal Chandra Mukherjee

Decision : July 24, 1978

Priyanath Ghosh

...

...

...

Appellant

Versus

Nishi Kanta Saha

...

...

Respondent*

Ejectment Suit—Two successive notices to quit for determination of tenancy—First notice effective for determination of tenancy—No waiver of first notice—Tenancy having been validly terminated once, whether suit on second notice to quit would be maintainable.

In the instant case, a notice to quit was duly served on the tenant on 16.3.67 whereby the defendant's tenancy was determined. In 1969, a second notice to quit was again served on the defendant calling upon him to vacate the premises by the end of April 1969. In the second notice to quit there was no reference of the earlier notice to quit. On the basis of the second notice to quit the instant suit was brought. The question now arises whether the present suit brought by the landlord on the basis of the second notice to quit was legal and valid.

HELD : It appears that by the first notice to quit, the tenancy of the defendant was duly terminated by the end of April 1967. There is nothing on record to show that the said notice to quit was illegal and invalid or that the said notice did not terminate the defendant's tenancy. That being the position, unless it is proved by the plaintiff that the first notice had been waived, the plaintiff's suit based on the second notice to quit must be held to be not maintainable.

The waiver of a notice of termination of a tenancy can be proved only by the conduct of the parties, that is, in spite of the termination of tenancy, the parties may agree that a new tenancy would be created or that the old tenancy would continue.

After the termination of the tenancy in question by the first notice, the landlord did not accept any rent from the defendant. True it is that the defendant had been depositing rents with the Rent Controller. That he had to do because he became a statutory tenant on the determination of his tenancy by a notice to quit and that being so, the defendant was under an obligation to deposit rent with the Rent Controller in order to protect his occupation in the premises.

In the present case, the defendant's tenancy was terminated by the first notice to quit. As a result thereof, the defendant became merely a statutory tenant and as such the defendant's tenancy could not again be terminated by a second notice to quit. Hence the instant suit having been brought on the basis of the second notice to quit, it must be held that the courts below went wrong in holding that the present suit was maintainable.

The landlord ought to have brought a suit on the first notice to quit.

*Appeal from Appellate Decree no. 1636 of 1971.

and as the defendant's tenancy had already been determined by the first notice to quit, the landlord should not have served a second notice to quit on the defendant for the purpose of instituting the ejectment suit on the basis of the second notice and as such the instant suit must be held to be not maintainable.

Cases referred to :—

(1) *Dilip Kumar Singha v. Abodh Gopal Ghosh*, 77 CWN 515

(2) *Tayabali Jaferbhai Tankiwalla v. M/s. Ashan & Co.*, AIR 1971 SC 102

Himadri Sankar Majumdar and Saumyabrata Mukherjee ...for the Appellant
Chandidas Roy Choudhury and R. K. Ghosal ... for the Respondent

The judgment of the Court was as follows :—

The defendant is the appellant in this Court. This appeal arises out of a suit for ejectment on the ground of default. The only point involved in this appeal is whether the suit brought by the landlord on the second notice is valid and legal, as admittedly by the first notice the landlord determined the tenancy of the defendant. The first notice was served on the defendant in 1967 by which the tenancy of the defendant was terminated. The present suit was brought on the notice which was issued on 10-1-69. In the second notice it has been stated that notice is given to quit and vacate the premises as soon as February, 1969 expires when the lease shall stand determined. In the said notice, there is no reference that on an earlier occasion, that is, on 16th March, 1967, another notice was served by which the defendant was asked to quit and vacate the premises and give vacant possession to the plaintiff with the end of the last day of the month of April, 1967. It is thus clear that by the first notice (Ext. I) the tenancy of the defendant was terminated by the end of April, 1967. There is nothing to show that the notice (Ext. I) is illegal and invalid and that the said notice did not determine the defendant's tenancy. That being so, unless it is proved by the plaintiff that the first notice was waived, the plaintiff's present suit based on the second notice that is on the notice dated 10-1-69 (Ext. 3) must be held to be not maintainable. Waiver of a notice of termination of a tenancy can be proved only by conduct of parties, that is in spite of termination of the tenancy, the parties agreed that a new tenancy would be created or that the old tenancy would continue. In the present case, there is absolutely no such evidence. After termination of the tenancy by the first notice (Ext. I), the landlord did not accept any rent from the defendant. True, the defendant deposited rents with the Rent Controller. That he must do as he was a statutory tenant even after the termination of the tenancy and that being so, he was under an obligation to deposit rent with the Rent Controller in order to protect his possession.

2. Mr. Himadri Sankar Majumdar, learned Advocate appearing

on behalf of the appellant has relied on a decision reported in (1) *Dilip Kumar Singha v. Abodh Gopal Ghosh*, 77 CWN 515. In this case the landlord served a notice of ejectment on the tenant and determined his tenancy. Thereafter, the tenant gave two notices to the landlord that the tenant would vacate the premises. Thereafter the landlord served another notice and brought the suit for ejectment on the second notice. It was held that after termination of the tenant's tenancy on the basis of the first notice, the tenant's notices were illegal as after the termination of the tenancy, the tenant was only a statutory tenant and had no right to serve notice on the landlord. It was further held that the ground for ejectment mentioned in clause (j) of section 13(1) of the West Bengal Premises Tenancy Act, 1956 relates to a contractual tenancy and in the instant case as the contractual tenancy had come to an end by the first notice given by the landlord and statutory tenancy has come into existence, there was no further scope for determining such tenancy by the tenant by giving a notice to quit. In the present case also the tenancy was terminated by the first notice (Ext. 1) and that being so, the tenant was merely a statutory tenant and as such the defendant's tenancy could not again be terminated by the second notice (Ext. 3) and that being so, the suit having not been brought on the second notice, it must be said that the learned courts below were wrong to say that the suit was maintainable. Mr. Ranjit Kumar Ghosal, learned Advocate appearing on behalf of the respondent refers to a decision reported in (2) AIR 1971 SC 102, *Tayabali Jafer bhai Tankiwalla v. M/s. Ashan & Co. & ors.*). In this case the landlord gave the first notice to quit. The tenant did not vacate. Then a second notice was given after about a year demanding the rent for the period between the first and second notices. In a suit for ejectment, the landlord claiming damages for use and occupation for the period subsequent to the second notice, show that the landlord was aware of the distinction between rent and compensation for use and occupation. It was held considering the facts and circumstances of the case that the first notice was waived and that the landlord had treated the tenancy as subsisting. The facts of the case before the Supreme Court are completely different from the facts of the present case. In that case the landlord claimed rent for the period between the first notice and the second notice and that being so, it was held that the first notice was waived, As has already been stated that in the present case, there was no acceptance of the rent by the landlord. This being the position as I have already held that the landlord ought to have brought the suit on the first notice and as the tenancy was already determined by the first notice there was no scope for the landlord to serve a second notice and that the suit brought on the second notice must be held to be not maintainable.

3. In the result, the appeal is allowed on contest. The judgments

and decrees passed by the courts below are set aside and the suit dismissed. There will be no order for costs in this appeal. The parties will bear their own costs in the courts below.

N. C. S.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee and Mr. Justice

Bankim Chandra Ray

Decision : July 24, 1978

Kanchanoor Bhaskar Shetty Appellant

Versus

State of West Bengal & Ors. Respondents*

Mandamus—Writ of—Who is entitled to such a writ—What conditions are to be fulfilled.

Promissory estoppel—Explained—Requirements of—Natural justice—Breach thereof—Scope of.

Representation—Public authority making representation and party acting on such representation to his prejudice—Effect thereof.

It is now well settled that the principles of natural justice can be invoked only in those cases where the decisions of the public officers affect fundamental rights or any other civil rights of a person. In the instant case the impugned decision of Respondent no. 1 does not affect any right whatsoever of the petitioner. It is a mere right to have his offer considered along with the offer of Respondent no. 2 by Respondent no. 1. It appears that Respondent no. 1 after consideration of the offers of the petitioner as well as of Respondent no. 2 has preferred to accept the offer of Respondent no. 2. The decision has not been made arbitrarily, capriciously or unreasonably but the same has been made on a fair and proper consideration of the two offers. As such there has been no discretion by Respondent no. 1 at the threshold and no civil right of the petitioner having been affected by the impugned decision the principles of natural justice cannot be invoked and the impugned order cannot be questioned on the ground of violation of the principles of natural justice as the petitioner was not given any opportunity of hearing before coming to the final decision by Respondent no. 1.

The doctrine of promissory estoppel is not applicable to the instant case inasmuch as there was no concluded contract made between the petitioner and Respondent no. 1 in the manner prescribed by Article 299 of the Constitution of India. It is now well settled that the contract entered into with the Government by a party in order to be valid must be

*Appeal from Original No. 357 of 1978.

made in the manner prescribed under Article 299 of the Constitution corresponding to section 175 of the Government of India Act 1935 and the contract not being made in the manner prescribed by the said provision will be void and of no legal effect as the requirements specified in Article 299(1) of the Constitution are mandatory. As there is no contract made in accordance with the provisions of Article 299(1) of the Constitution no question of promissory estoppel arises in the instant case. Moreover, the power to carry on trade is an executive function as provided in Article 298 of the Constitution and as such the doctrine of promissory estoppel cannot at all be invoked against Respondent no. 1.

Public bodies are as much bound as private individuals to carry-out representations of facts and promises made by them relying on which other persons have altered their position to their prejudice. In the instant case no such representation has been made by Respondent No. 1 to the petitioner. Therefore it cannot be urged that Respondent no. 1 made certain representation to the petitioner and the petitioner acted on such representation and changed his position to his prejudice.

The appellant prayed for a writ of Mandamus. In order to have such a writ he will have to show that he has a fundamental right or statutory right which imposes a legal duty on the public authority concerned and that he has a legal right to its performance. In this case, it appears that the petitioner has neither any constitutional right nor any statutory right and as such the application for a writ of Mandamus as claimed by him is not maintainable. A writ of Mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and the failure on the part of that officer to discharge that statutory obligation.

Cases referred to :—

- (1) *M/s. Erusion Equipment and Chemicals Ltd. v. State of West Bengal & another*, AIR 1975 SC 266.
- (2) *M/s. Radhakrishna Agarwal and others v. State of Bihar and others*, AIR 1977 SC 1496.
- (3) *Chairman Ramappa Gundappa Sahakari Samyakta Besava Sangh Ltd. v. State of Mysore and others*, AIR 1974 SC 856.
- (4) *M/s. Hochtief Gammon v. State of Orissa & ors*, AIR 1975 SC 2226
- (5) *The State of Orissa v. Dr. Mills Binapani Dei and others*, AIR 1967 SC 1269.
- (6) *A. K. Kraipak and others v. Union of India and others*, AIR 1970 SC 150.
- (7) *Union of India v. J. N. Sinha*, AIR 1971 SC 40.
- (8) *D. F. O. South Kheri and others v. Ram Senahi Singh*, AIR 1967 SC 1269.
- (9) *Mohindor Singh Gill and another v. The Chief Election Commissioner, New Delhi and others*, AIR 1978 SC 851.

- (10) *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
 - (11) *Schmidt v. Secretary of State for Home Affairs*, (1969) 2 Ch. D. 149
 - (12) *Vhikraj Jaipuria v. Union of India*, AIR 1962 SC 113.
 - (13) *H. S. Riky v. New Delhi Municipality*, AIR 1962 SC 554.
 - (14) *State of West Bengal v. B. K. Mondal and sons*, AIR 1962 SC 779
 - (15) *State of Bihar v. M/s. Karam Chand Thapar and Brothers Ltd.*, AIR 1962 SC 110.
 - (16) *Excise Commissioner U. P. v. Ram Kumar*, AIR 1976 SC 2237.
 - (17) *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh and others*, AIR 1977 SC 2149.
 - (18) *Union of India v. Anglo Afgan Agencies etc.*, AIR 1968 SC 718.
 - (19) *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council and another*, AIR 1971 SC 1021.
 - (20) *Lekhraj Satrandas Lalvani v. Deputy Custodian-cum-Managing Officer*, AIR 1966 SC 334.
- R. C. Deb, Goutam Chakraborty and Asok Kumar Ganguly*
 for appellant no. 1
Somnath Chatterjee, Tarun Kumar Basu and Samir Kumar Ghose
 for Respondent no. 2
N. N. Gupta and Suproakash Banerjee for State

The judgment of the Court was as follows :—

Ray, J. : This appeal by the petitioner arises out of the judgment and order passed in Civil Rule No. 5923 (W) of 1977 filed on February, 9, 1978 by T. K. Basu, J. discharging the Rule.

2. The petitioner Kanchanoor Bhaskar Shetty carrying on business of advertising under the name and style of Classic Advertising submitted an application on January 19, 1977 before the Public Works Department, Government of West Bengal for the grant of licence for fixing kiosks on street lamp post owned by the Public Works Department in the Maidan area and on the V.I.P. Road up to the Calcutta Air Port offering to pay a sum of Rs. 12,000/- annually as rent. The petitioner thereafter submitted a sketch plan showing the types of kiosks to be mounted to the street lamp posts as directed by the Assistant Chief Engineer, P.W.D. on 2nd May, 1977. A letter was issued under the signature of the Deputy Secretary II, Public Works Department (Works Branch), Government of West Bengal to the petitioner intimating him the decision of the Government about the terms and conditions of the permission to display advertisement on boards. The terms and conditions are set out hereunder :—

- “(1) Tenure of the permission will be five years for the present.
- (ii) Display on boards will be allowed on all lamp posts by the side of Maidan roads/VIP Road.
- (iii) Rental @ Rs. 12,000/- per annum is acceptable by the PWD

with the proviso that three months' rental against Rs. 12,000/- per annum is required to be paid in advance by the Coy.

(iv) The Coy. will get the model advertisement board approved by the P.W.D. prior to fixing them on lamp posts.

(v) The Coy. will arrange for painting of the lamp posts at its cost after every five years at their cost."

The petitioner was also informed that on receipt of the formal acceptance of the above terms and conditions in writing by him further action in the matter would be taken. The petitioner by his letter dated 3rd, May, 1977 intimated the Deputy Secretary II, PWD (Works Branch) about his acceptance of the terms and conditions mentioned in the said letter and also requested him to let him know the procedure for payment of the quarterly advance rental amounting to Rs. 3,000/- in order to enable him to remit the said amount. It has been stated that after acceptance of the letter dated 2nd May, 1977, the petitioner purchased materials for manufacturing frames and fixtures required for display of kiosks to be fixed on Maidan area and VIP Road. The petitioner also contacted various agencies and clients for the purpose of display of advertisements in the kiosks and had received response from several clients in this matter. It has also been stated that the petitioner's Branch Manager one Mr. A. D. Fenn called on the appropriate authorities of the Public Works Department for issue of necessary challan for deposit of the advance sum of Rs. 3,000/- but as the challan was not issued by the department the advance rent could not be deposited. On 5th of August, 1977, the petitioner's Branch Manager was surprised to find about 5 or 6 boards and/or kiosks put up in the Maidan area in the name of 'Adwave', the business of the respondent No. 2. The petitioner made enquiries in the office of the PWD but he was not given any information if the final decision for putting up kiosks in the Maidan area and on the VIP Road was given in favour of the respondent No. 2. It has been pleaded that the respondent No. 1 after the decision to grant licence to the petitioner No. 1 by its letter dated 2nd May, 1977 could not give permission or licence to the respondent No. 2 for display of advertisements in kiosks on street lamp posts. It has also been stated that the respondent No. 2 accompanied the petitioner's Branch Manager, Mr. Fenn at the time of when talks were held regarding the grant of permission to display of advertisements in kiosks to be installed in the Maidan area and in the VIP Road. The respondent No. 1 is estopped from permitting any one else except the petitioner to put up kiosks on the street lamp posts in the said area as the petitioner changed his position to his prejudice on the basis of the said decision. It was also submitted that the act of the respondent No. 1 in granting permission to respondent No. 2 to put up kiosks is arbitrary and in violation of the principles of natural justice. It has been prayed that a writ of Mandamus be issued to

withdraw, cancel or rescined the permission granted, if any, by the Public Works Department to the respondent No. 2 to erect or construct advertisement boards or kiosks on street lamp posts in the Maidan area and in the VIP Road. A Rule being CR 5923(W) of 1977 was issued.

3. A rejoinder to the said petition sworn by Sri S.K. Deb, Deputy Secretary II, PWD (Works Branch), Government of West Bengal was filed, stating *inter alia*, that the Government was not at all liable for the expenditure incurred by the petitioner for construction of kiosks and also for advertisements for procuring clients as no contract was finally concluded between the petitioner and the respondent No. 1 by executing the deed of agreement in the manner prescribed as required. It has also been stated that he was the officer dealing with the subject-matter and no other subordinate or employee of the PWD had anything to do with the matter. It has further been stated that no permission was ultimately given to the petitioner by execution of a deed of agreement. The letter dated May 2, 1977 cannot be taken to be a permission granted by the Government to the petitioner. It has also been averred that the petitioner's Branch Manager did not even call on him after 2nd May, 1977 in respect of this matter. The respondent No. 2 applied to the Engineer-in-Chief and Ex-officio Secretary, Public Works Department, for grant of licence to put up advertisements in kiosks on the street lamp posts in the Maidan area and in the VIP Road at an annual licence fee of Rs. 15,000/-stating that he is an unemployed Bengali youth trying to build up his career. It has been stated that it is the policy of the Government to solve the unemployment problem in the State and as the respondent No. 2 is agreeable to pay licence fee at the rate of Rs. 15,000/- per year which was more than the rate offered by the petitioner, the Government after due consideration by letter dated June 29, 1977 intimated the respondent No. 2 its decision to grant permission to the respondent No. 2 on conditions stipulated therein. Since the respondent No. 2 gave a high offer of Rs. 15,000/- per annum and he was an unemployed youth, as represented by him, the said decision was made by the Government in preference to the offer made by the petitioner. It has also been stated that the Deputy Secretary II, by his letter dated July 14, 1977 sent amended draft agreement to the respondent No. 2 for the purpose of execution of the same on a stamp paper. The deed of agreement on stamp paper was executed between the State of West Bengal and the respondent No. 2 on July 19, 1977. An order of sanction by Governor was also issued subsequently in memo no. 3289/3-W(C) dated 20th July, 1977. The respondent No. 2 paid the first instalment of licence fee of Rs. 3,750/-. It has also been stated that the petitioner did not make any enquiry from the office of the respondent No. 1.

4. An affidavit-in-opposition sworn by the respondent No. 2 has

also been filed. It has been denied that the petitioner was granted permission to put up kiosks on the street lamp posts in the Maidan area and on VIP Road by the decision of the respondent No. 1 dated 2nd May, 1977. The respondent No. 2 applied for permission to put up kiosks he being an unemployed youth his offer being the highest was accepted and he was granted licence to put up advertisements on kiosks on the street lamp posts in Maidan area and on the VIP Road. An agreement between him and the respondent No. 1 has been duly executed. Sanction of the Governor has also been duly accorded for the same.

5. Two affidavits-in-reply have been filed on behalf of the petitioner reiterating statements and allegations made in the petition and denying the statements and allegations made in the said affidavits-in-opposition.

6. On February 9, 1978, T. K. Basu, J. after hearing the parties discharged the Rule holding that there was no promissory estoppel inasmuch as there was no contract between the parties in the manner prescribed in Article 299 of the Constitution of India. It was further held that there could not be any promissory estoppel against the Government in exercising of its sovereign, executive and legislative functions. The petitioner is not on the threshold of the contract but already entered into the field of contract. Petitioner has no Constitutional right and as such there is no question of infringement of the provisions of the Article 14 of the Constitution. It has also been held that the petitioner has not any right either constitutional or Statutory which can be enforced in the writ jurisdiction and the application for a writ of Mandamus is not maintainable.

7. Feeling aggrieved by the said judgment and order the instant appeal has been preferred.

8. Mr. Rathin Chandra Deb, learned Counsel appearing in support of the appeal has submitted that the executive decision of the respondent No. 1 as communicated by letter dated 2nd May, 1977 agreeing to grant licence to the petitioner for fixing up kiosks for display of advertisements on the lamp posts has given rise to a Constitutional right in favour of the appellant which cannot be taken away or nullified arbitrarily without giving the appellant any opportunity of hearing. The decision in favour of the respondent no. 2 allowing him to put up kiosks is arbitrary and violative of the principles of Natural Justice. It has been further submitted by Mr. Deb that the purported decision made by the respondent No. 1 in favour of the respondent No. 2 ignoring the decision made earlier in favour of the petitioner no. 1. is violative of the principles of Natural Justice. It has also been submitted that the offer given by the petitioner though a better offer and in spite of previous decision in favour of the appellant was not duly considered and the offer of the respondent No. 2 was arbitrarily accepted. The appellant thus has been discriminated upon

and this is a clear violation of the provisions of the Article 14 of the Constitution. It has been submitted that the petitioner changed his position and acted to his prejudice on the basis of the decision as contained in the letter dated May 2, 1977 by the respondent No. 1 and as such the respondent No. 1 is bound to carry out its obligations under the said decision, that is, representation. It has also been submitted that the respondent No. 2 who happened to be acquainted with the Branch Manager of the appellant was present at the time when the talks regarding the grant of licence for fixing up kiosks on street lamp post were held by the Branch Manager with the officers of the Public Works Department. After knowing about this matter the respondent No. 2 applied for grant of licence for the same offering to pay a certain amount as licence fee per annum. This amounted to stealing of the contract.

9. Mr. Somnath Chatterjee, learned counsel appearing on behalf of the respondent No. 2 has, on the other hand, submitted that there is neither any constitutional right nor statutory right to get one's offer accepted by the State. It is for the executive to choose the person with whom it will make the contract or whose offer will be accepted. The right to carry on trade and acquire and dispose of property is an executive power of the State and when there are several offers it is for the State to decide which of them appear to it to be the appropriate offer to accept. There is no discrimination at the threshold of the contract that is at the time of entry in the field of consideration of persons with whom the Government will make the contract. As such there is no discrimination at all and Article 14 of the Constitution has got no application. It has been next submitted that the decision as contained in the letter dated 2nd May, 1977 purported to have been made in favour of the appellant does not create any legal right which merely provides that if certain terms and conditions mentioned there are accepted further action in the matter of grant of licence will be taken. After this letter was issued to the appellant on 2nd May, 1977, nothing was done by the appellant as required under it and as such no right has accrued on the basis of the said decision in favour of the appellant. It has been next submitted that when there are competing claims choice of one of the competing claimants cannot mean discrimination at all. There is no exclusion of any claim from consideration. It has been further submitted that there being no contract made in the manner prescribed in Article 299 of the Constitution of India no legal right has accrued in favour of the appellant. It has also been submitted that there was no representation on behalf of the respondent No. 1 to the appellant and as such no question of estoppel arises. It has been lastly contended that the executive action is not giving the contract to the petitioner does not involve any civil consequences and as such there is no question of violation of the principles of natural justice.

10. The sheet-anchor of the contention advanced on behalf of the appellant is that the decision by the respondent No. 1 as contained in letter dated 2nd May, 1977 in favour of the appellant has created a constitutional right and as such the said right cannot be arbitrarily taken away or nullified by the executive without giving him any opportunity of hearing. Article 293 of the Constitution provides that the executive powers of the Union and the State shall extend to carrying on of any trade and to the acquisition, holding and dispose of property and the making of contract for a purpose. Thus the State can carry on this executive function either by making a law or without making a law. The exercise of this executive power is subject to Part II of the Constitution and as such Article 14 of the Constitution is applicable to the exercise of such powers. So in the matter of public contract equal opportunities are to be given to the citizens who apply and they cannot be discriminated upon in the matter of giving their offer for such contracts and of having the same considered. In other words, there cannot be any discrimination at the threshold or at the time of entry in the field of consideration of persons with whom contracts will be made by the Government. This has been held in (1) AIR 1975 SC 266, *M/s. Erusian Equipment and Chemicals Ltd. v. State of West Bengal* another. This decision has been referred to in the case reported in (2) AIR 1977 SC 1496, *M/s. Radhakrishna Agarwal and others v. State of Bihar and others* and it has been observed, "Article 14 of the Constitution imports a limitation or/imposes an obligation upon the State's executive power under Article 298 of the Constitution. All constitutional powers carry corresponding obligation with them." So if there is a discrimination at the very threshold, that is, at the time of entry into the field of consideration of persons with whom the Government would contract the executive act of selecting the offer of a person will be certainly violative of Article 14 of the Constitution. In the instant case the appellant made his application to the respondent No. 1 to get the contract. The appellant was not debarred from consideration of his application at the very threshold. On the other hand, it is evident that the appellant entered into the field of contract and his application as well as the application of respondent No. 2 were duly considered as evident from the clear averment made in paragraph 10 of the Affidavit-in-opposition sworn on behalf of the respondent No. 1 by Sri S. K. Deb, Deputy Secretary II, P.W.D. (Works Branch), Government of West Bengal. It has been stated there clearly that in consideration of the high offer given by the respondent No. 2 and also that the respondent No. 2 was an unemployed youth the Government accepted his offer in preference to the offer made by the petitioner. It has also been stated therein that it was the policy of the Government to solve unemployment problem and that was also taken into consideration in accepting the offer of respondent No. 2. It is pertinent to

refer in this connection to the decision in (3) AIR 1974 SC 856, *Chairman Ramappa Gundappa Sahakari Samyaka Besava Sangh Ltd. v. State of Mysore & ors.* where it has been held that in respect of the lands belonging to the Government it is free to give lease of such lands whomsoever it chooses and it can change its policies from time to time in accordance with its own social objectives and any order modifying or nullifying the earlier policy decision by a subsequent resolution cannot be deprivatory of any one's rights. The action of the respondent No. 1 in accepting the offer of the respondent No. 2 and in entering into an agreement granting him licence to put up kiosks on lamp posts on the Maidan area and on VIP Road is not discriminatory and as such the same is not in contravention of Article 14 of the Constitution of India.

11. It has been contended further in this connection that the decision to grant licence to the respondent No. 2 to put up kiosks is violative of the principles of natural justice as no reason has been given in the order itself why the case of the petitioner appellant was ignored and secondly no opportunity of hearing was given to the petitioner appellant before the decision was taken granting the licence to the respondent No. 2. Reference has been made in this connection to the decision reported in (4) AIR 1975 SC 2226, *M/s. Hochtief Gammon v. State of Orissa and others*, where it has been observed that the executive had to reach their decisions by taking into account relevant considerations. The executive cannot avoid scrutiny by courts by failing to give reasons. Even if the Executive considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts. It is well settled that the principles of natural justice applies to authorities exercising statutory powers conferred by rules framed under the Act. In other words, when administrative decisions adversely affect rights of the parties or in other words, involving civil consequences the principles of natural justice are applicable unless expressly excluded by Act. It has been held in (5) *The State of Orissa v. Dr. (Miss) Binapani Dei and others*, reported in AIR 1967 SC 1269 that a party to whose prejudice an order is intended to be passed is entitled to a hearing and this applies a like to judicial tribunals and bodies of person invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed; if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such powers.

12. In (6) AIR 1970 SC 150, *A. K. Kraipak and others v. Union of India and others*, it has been observed that the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of

justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. This decision has been followed in (7) AIR 1971 SC 40, *Union of India v. J. N. Sinha*, and it was held that administrative authorities in making orders affecting rights of the person must act fairly and not perversely or arbitrarily. In other words, rules of natural justice required are called in aid to prevent miscarriage of justice and to ensure a just decision. The rules of natural justice will be applicable unless the statutory provision expressly or impliedly excludes the application of any of the rules of natural justice. The Government had the authority to retire a Government servant on his attainment of the age of superannuation and as such it has been held that order of superannuation which did not deprive the Government servant of any of his rights and was not penal in nature of principles of natural justice could not be applied. Following the decision in AIR 1967 SC 1269 (*Supra*) it was held in the case of (8) *D.F.O., South Kheri and others v. Ram Senahi Singh*, that administrative order had to be made in consonance with the rules of natural justice when it affected the respondent's right to property.

13. As has been observed in (9) AIR 1978 SC 851, *Mahindor Singh Gill and another v. The Chief Election Commissioner, New Delhi and others* that unless civil consequences ensue hearing is not necessary and observance of the principles of natural justice does not arise. A civil right being adversely affected is a sine qua non for the invocation of the *audi alteram partem* rule. Civil rights have been held to include rights of property, marriage, protection by the laws, freedom of contract, trial by jury etc. In other words, civil rights are rights pertaining to a person by virtue of his citizenship in a State or community. Rights capable of being enforced or redressed in a civil action. It has been pronounced by the Supreme Court in (10) AIR 1978 SC 597 *Smt. Maneka Gandhi v. Union of India*, that the fundamental rights protected by Part III of the Constitution out of which Article 14, 19 and 21 are the most frequently invoked, form tests of the validity of executive as well as the legislative actions when these actions are subjected to judicial scrutiny. Executive authorities while taking administrative action involving any deprivation of or restrictions on inherent fundamental rights of citizens must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even appearance of arbitrariness or unfairness. They have to act in a manner which is pretently impartial and meets the requirements of natural justice. Fairplay in action demand that any opportunity to be heard should be given to the person affected. Rules of natural justice had been stated by Lord Denning, M.R. in (11) (1969) 2 Ch D. 149 *Schmidt v. Secretary of State for Home Affairs*, in these terms :—

- “Where a public officer has power to deprive a person of his liberty or his property the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf.”

Thus on a conspectus of all the above decisions it is now well settled that the principles of natural justice can be invoked only in cases where the decision of the public officers affects fundamental rights or any other civil rights of a person. In the instant case the impugned decision of the respondent No. 1 does not affect any right whatsoever of the petitioner not to speak of any fundamental right of the petitioner. If there is any right of the petitioner at all it is a mere right to have his offer considered along with the offer of the respondent No. 2 by the respondent No. 1. We have already held that the respondent No. 1 after consideration of the offers of the petitioner as well as of the respondent No. 2 have preferred to accept the offer of the respondent No. 2. The decision has not been made arbitrarily, capriciously or unreasonable but the same has been made on a fair and proper consideration of the two offers. As such there has been no discrimination by the respondent No. 1 at the threshold and no civil right of the petitioner being affected by the impugned decision the principles of natural justice cannot be invoked and the impugned order cannot be questioned on the ground of violation of the principles of natural justice as the petitioner was not given any opportunity of hearing before coming to the final decision by the respondent No. 1. There is, therefore no merit in this contention and as such the same is overruled.

14. The doctrine of promissory estoppel is not applicable to the instant case inasmuch as there was no concluded contract made between the petitioner and the respondent No. 1 in the manner prescribed by Article 299 of the Constitution of India. It is now well settled that the contract entered into with the Government by party in order to be valid must be made in the manner prescribed under Article 299 of the Constitution of India which corresponds to Section 175 of the Government of India Act, 1935 and a contract not made in the manner prescribed by the said provision will be void and of no legal effect as the requirement specified in Article 299(1) of the Constitution are mandatory. This has been held in the cases reported (12) in AIR 1962 SC 113, *Vhikraj Jaipuria v. Union of India*, (13) AIR 1962 SC 554, *H. S. Riky v. New Delhi Municipality* (14) AIR 1962 SC 779, *State of West Bengal v. B. K. Mondal and sons*, (15) AIR 1962 SC 110, *State of Bihar v. M/s. Karam Chand Thapar and Brothers Ltd.* As there is no contract made in accordance with the provisions of Article 299 (1) of the Constitution no question of promissory estoppel arises in the instant case. It is well settled as observed in (16) AIR 1976 SC 2237, *Excise Commissioner, U.P. v. Ram Kumar* that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers. This

decision has been followed in later decision in (17) AIR 1977 SC 2149. *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh and others* where it has been held that the doctrine of promissory estoppel could not be pressed into service against the Government in exercise of its sovereign, executive and legislative functions. In the instant case the power to carry on trade is an executive function as provided in Article 298 of the Constitution and as such the doctrine of promissory estoppel cannot at all be invoked against the respondent No. 1.

15. It has been next contended that the respondent No. 1 by its decision dated 2nd May, 1977, agreed to grant licence in favour of petitioner. This decision though not expressed to be made in the form of a contract as prescribed by Article 299(1) of the Constitution of India and though not signed in the manner provided by the parties concerned yet on the basis of this representation the petitioner expended money for the construction of kiosks and also for advertisements in order to procure clients for making advertisements in kiosks. The petitioner thus has changed his position to his prejudice and detriment and as such it has been contended that the respondent No. 1 cannot ignore the promise made by it and cannot avoid performance to its obligation under the said promise. Reliance has been placed in this connection to the decision in (18) AIR 1968 SC 718, *Union of India v. Anglo Afgan Agencies etc.* and (19) AIR 1971 SC 1021, *Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council and another.* Neither of these decisions apply to the instant case. In *Anglo Afgan Agencies'* case there was an export promotion scheme published by the Textile Commissioner under Section 3 of the Imports and Exports (Control) Act, 1947 offering incentive to the prospective exporters of woollen goods to export woollen products to Afghanistan and to import raw materials of the total amount equal to 100% of the FOB value of the exports and certificates to that extent will be issued by the Textile Commissioner. The Textile Commissioner, in that case did not arbitrarily issue certificates for import of raw materials of the equal value of the goods exported to the respondents. It was held that the respondent who had acted to his prejudice relying upon the representation made by the Union of India and its officers by the Export Promotion Scheme were not entitled at their will to ignore the promise made by the Government. The respondents have acted to their detriment on the basis of the representation and as such in equity the Government was bound to honour their promise and it was bound to fulfil the same. Similar observation was made in the case reported in AIR 1971 SC 1021 (*Supra*) where it has been observed that when a promise has been made not to impose octroi and the Century Spinning Mills acted on the same promise the Ulhasnagar Municipality was estopped from imposing octroi on the said Spinning Mill. Public bodies are as such bound as private individuals to carry out representations of facts and promises made by

them relying on which other persons have altered their positions to their prejudice. These decisions have no application to the instant case as the petitioners in those cases did not seek to enforce any contractual right unlike this case. In the instant case no such representation has been made by the respondent No. 1 to the petitioner. It is the petitioner who made an offer to take licence of putting up kiosks on lamp posts in the Maidan area as well as on VIP Road. The respondent No. 1 only laid down certain conditions for grant of such licence and asked the petitioner by letter dated 2nd May, 1977 that on acceptance of those conditions by the petitioner further steps in the matter of grant of licence would be considered. Thus no decision was at all made to grant licence to the petitioner and no contract has, in fact, been entered into between the parties in the manner prescribed under Article 299 of the Constitution. Therefore it cannot be urged that the respondent No. 1 made certain representation to the petitioner and the petitioner acted on such representation and changed his position to his prejudice. Moreover, in the instant case it is a question of acceptance of offer of the petitioner for grant of licence and of making of a contract to that effect. Thus the matter falls within the domain of contract and as such the above decisions at all are not applicable to this case.

16. The appellant in order to have a writ of Mandamus will have to show that he has a fundamental right or statutory right which imposes a legal duty on the public authority concerned and he has a legal right to its performance. In this case we have already held that the petitioner has neither any constitutional right nor any statutory right and as such the application for the writ of Mandamus as made by him is not maintainable. A writ of Mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and the failure on the part of that officer to discharge that statutory obligation. This has been held by Supreme Court in (20) AIR 1966 SC 334, *Lekhraj Satrandas Lalvani v. Deputy Custodian-cum-Managing Officer, Bombay*. This decision has been followed in AIR 1977 SC 2149 (Supra) and it has been observed that an application for grant of a writ of Mandamus under Article 226 of the Constitution was not competent at the instance of the persons who sought to enforce an obligation flowing from a contract which having not been made in accordance with the manner prescribed was not binding and enforceable.

17. In the premises aforesaid the appeal fails and is therefore dismissed without any order as to costs. The judgment and order of the learned Trial Judge is hereby affirmed. All interim orders are vacated.

Mookerjee, J. : I agree.

P. R.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Murari Mohan Dutt and Mr. Justice

Dhires Chandra Chakraborty

Decision : March 20, 1978

Central Bank of India ... (Plff) Petitioner
Versus

Sunil Kumar Paul ... Opposite party*

Indian Stamp Act (11 of 1899), Sec. 9—Notification under—Item no. 99—Exemption of Stamp Duty—Hypothecation Deed comes within such exemption—Article 6 of Bengal Stamp Amendment Act not applicable to Hypothecation deed—Construction of Item no. 99.

A Suit was instituted by the Central Bank of India against the opposite party praying for a decree for Rs. 83,371.56 p. upon a declaration that all stocks of certain machinery and goods are charged and hypothecated for payment of the Bank's dues and for sale of such goods and machinery mentioned in the schedule to the plaint. The opposite party did not appear in the suit and as such the suit was taken up for hearing *ex parte*. At the hearing the plaintiff wanted to prove the hypothecation deed. It appears that the said deeds bear stamps worth Rs. 1.50 p and Refugee Stamps worth 10 p. each. The trial court took the view the said deeds should be stamped under Article 6 of the Bengal Stamp Amendment Act. Accordingly an enquiry was held in that respect. Thereafter the trial court by an order directed the plaintiff to put in the requisite stamp duty and a sum by way of penalty. The plaintiff filed an application for recalling the said order whereby the plaintiff was directed to pay the requisite stamp duty and penalty. That application of the plaintiff was rejected. Hence the Rule.

HELD: It is true that Item no. 99 of the Notification issued under section 9 of the Indian Stamp Act has used the expression "as agreement relating to the hypothecation of movable property". But it will be incorrect to construe that Item 99 solely on the basis of that expression. The latter part of Item 99 makes it clear that the exemption relates to a deed of hypothecation for it states "where such hypothecation has been made by way of security for the repayment of money advanced or to be advanced by way of loan". If Item no. 99 relates only to an unattested instrument evidencing an agreement relating to the hypothecation of movable property, there cannot be any question of any hypothecation to be made by way of security.

On a proper construction of Item no. 99, it appears, that the said item exempts an unattested instrument of hypothecation. These deeds are covered by the said notification, and as such exempted from payment of any stamp duty.

Saktinath Mukherjee and Maloy Mohan Guha ... for the Petitioner
 No one ... for the Opposite party

*Civil Rule No. 2875 of 1976.

The judgment of the Court was as follows :—

Dutt, J. : This Rule is at the instance of the plaintiff, the Central Bank of India and it is directed against Order No. 21 dated June 1, 1976 and Order No. 23 dated June 25, 1976 of the learned Sub-ordinate Judge, 8th Court, Alipore.

2. The suit in which the impugned orders were passed, has been instituted by the petitioner against the opposite party, *inter alia*, praying for a decree for Rs. 83, 371. 56 P. upon a declaration that all stocks of Calcium carbonate power, spindle, oil, raw rubber etc. and machinery and other kinds of raw materials are charged and hypothecated for payment of the dues of the petitioner. Further, the petitioner has prayed for a decree for sale of the said goods and machinery mentioned in Schedule 'G' to the plaint by public auction or by private treaty with liberty to the petitioner to appropriate the sale proceeds thereof after defraying therefrom costs, charges and expenses of the sale in protanto satisfaction of the claims of the petitioner, interim interest and interest on judgment.

3. The opposite party did not appear in the suit and, as such, it was taken up for hearing *ex parte*. At the said *ex parte* hearing of the suit, the petitioner wants to prove the said hypothecation deeds dated September 14, 1973 and March 23, 1973 in respect of movable properties as described in the Schedule to the said documents. The deeds bear stamp worth Rs. 1. 50 and refugee relief stamp worth 10P. each.

4. The learned Subordinate Judge took the view that the deeds should be stamped under Article 6 of the Bengal Stamp Amendment Act. He directed the Sheristadar to check and report about the stamp duty and penalty to be paid by the petitioner on the said deeds. The hearing was adjourned. Thereafter, by his order dated June 1, 1976 the learned Subordinate Judge directed the petitioner to put in the stamp duty and penalty as per the report of the Sheristadar. The petitioner filed an application for recalling the said order dated June 1, 1976. It was contended on behalf of the petitioner that as per the Notification issued by the Central Government such hypothecation deeds were exempted from payment of stamp duty under section 9 of the Indian Stamp Act. The learned Subordinate Judge overruled the said contention of the petitioner and rejected the said application. Hence this Rule.

5. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the petitioner, has produced before us a copy of Mulla's Indian Stamp Act, 1899, Third Edition, which contains the Notification under section 9 of the Indian Stamp Act. The Notification is, *inter alia*, as follows :—

"Financial Department No. 6 of the 12th September 1931. In exercise of the powers conferred by section 9, clause (a) of the Indian Stamp Act, 1899 (11 of 1899), and in supersession of all previous notifications issued from time to time under the said clause of the said section, the Governor General in Council is pleased to reduce, to the

extent set forth in each case, the duties chargeable under the said Act in respect of the instruments hereinafter described under Nos. 3,4,10, 23, 25, 48, 74, 89, 90, 91, 98, 102, 109, 110 and 111 and to remit the duties so chargeable in respect of instruments of the other classes hereinafter described.

.....
99. Unattested instrument evidencing an agreement relating to the hypothecation of moveable property, where such hypothecation has been made by way of security for the repayment of money advanced or to be advanced by way of loan or of an existing or further debt."

The learned Subordinate Judge has taken the view that Item No. 99 under the said Notification exempts from stamp duty an agreement relating to the hypothecation of movable property and not a deed of hypothecation. In that view of the matter, it has been held by the learned Subordinate Judge that the deeds of hypothecation which do not evidence an agreement relating to the hypothecation of movable property are not exempt from stamp duty under item 99 of the said Notification.

6. We are, however, unable to accept the said reasoning of the learned Subordinate Judge. It is true that Item 99 states "as agreement relating to the hypothecation of movable property". But it will be incorrect to construe that Item solely on the basis of the said expression. The latter part of Item 99 makes it clear that exemption relates to a deed of hypothecation, for it states "where such hypothecation has been made by way of security for the repayment of money advanced or to be advanced by way of loan". If Item 99 relates only to an unattested instrument evidencing an agreement relating to the hypothecation of moveable property, there cannot be any question of any hypothecation to be made by way of security.

7. On a proper construction of the said Item 99, we are of the view that it also exempts an unattested instrument of hypothecation. In the instant case, the deeds in question are unattested deeds of hypothecation and they are, therefore, covered by the said Notification. In these circumstances, the learned Subordinate Judge was not justified in imposing payment of stamp duty on the said deeds of hypothecation. In view of Item No. 99 of the said Notification, the said deeds are exempt from payment of any stamp duty.

8. In these circumstances, the orders of the learned Subordinate Judge dated 1.6.76 and 25.6.76 are set aside. The learned Subordinate Judge is directed to admit the said deeds of hypothecation in evidence without any stamp duty, if such admission is not otherwise barred. The Rule is thus made absolute. There will be no order as to costs.

Chakraborti, J. : I agree.

S. P. M.

[CIVIL REVISIONAL JURISDICTION]

Before Justice Mrs. Jyotirmoyee Nag

Decision : June 23, 1978

Baidyanath Roy & Ors.

...

...

Petitioners

Versus

Sm. Anej Bibi

...

...

...

Opposite party*

Constitution of India — Article 227 — Application under — Maintainability — Order complained of being order of District Judge acting as appellate authority under section 29 (3) of the West Bengal Premises Tenancy Act 1956.

West Bengal Premises Tenancy Act (12 of 1956), Sec. 34 — Application by tenant for obtaining Rent Controller's permission to effect repairs — Whether such application would lie being presented by statutory tenant.

Three tenants occupying three different portions of one premises filed a joint petition under section 34 of the West Bengal Premises Tenancy Act, 1956 for obtaining the requisite permission of the Controller for effecting necessary repairs in respect of the premises in their respective occupations. The Rent Controller by his Order dated 19.2.76 granted the requisite permission for effecting the necessary repairs. The said order of the Controller was being challenged by the landlord in appeal before the learned District Judge exercising powers under section 29 of the Act, and after hearing the parties, the learned District Judge set aside the order of the Controller. Being aggrieved by the appellate judgment and order, the tenants moved an application under Article 227 of the Constitution of India and obtained a Rule.

At the hearing of the Civil Rule, the landlord opposite party raised a preliminary objection as to maintainability of the application under Article 227 of the Constitution of India in view of the 42nd Amendment of the Constitution.

HELD: *The Rent Controller is not a 'Court' but a persona designata. It has been argued on behalf of the petitioners that under section 29(1) of the West Bengal Premises Tenancy Act, an appeal lies from every order of the Controller to the District Judge and therefore the District Judge is a court within the meaning of Article 227(6) of the Constitution. But that contention is not tenable. The 'judgment' within the meaning of Article 227(6) must be regarded as the judgment of a 'Court'. If the Controller be not a court but a persona designata, an appeal to the District Judge as per section 29(1) of the Act does not make that judgment of the District Judge the judgment of the Court. An appeal is nothing but a continuation of the proceeding before the Controller. The District Judge is therefore an appellate authority under section 29(3) of the W. B. Premises Tenancy Act. That being the position, the application under Article 227 is not maintainable.*

*Civil Rule no. 2743 of 1977.

A statutory tenant is not entitled to claim any relief as provided in section 34 of the West Bengal Premises Tenancy Act, 1956.

Kulidas Basu and Nandalal Shaw *for the Petitioners*
J. Islam and S. N. Jas *for the Opposite party*

The judgment of the Court was as follows :—

This Rule is directed against the judgment passed in Misc. Appeal No. 20 of 1976 setting aside the order dated 19.2.76 passed by the learned Rent Controller of Rampurhat in Misc. Case No. 234 of 1974 under Section 34 of the West Bengal Premises Tenancy Act, 1965. An application under Section 34 of the West Bengal Premises Tenancy Act for permission to repair the premises of the petitioners was made before the learned Rent Controller and by his order dated 19.2.76 the learned Rent Controller was pleased to grant permission to the petitioners in that case to make the necessary repairs at a cost not exceeding six months rent. Against that the landlord preferred an Appeal and the learned Appellate Officer was pleased to set aside the order of the Rent Controller as stated above. In that case before the Rent Controller there were three petitioners who were the tenants in respect of three different portions of the same premises. So far as these tenants are concerned, the landlord had instituted an Ejectment Suit after giving notice to the tenants under Section 13(6) of the West Bengal Premises Tenancy Act. Two of the suits against two of the petitioners were withdrawn and the landlord acknowledged them as tenants and they continued to be in possession of the premises as tenants. So far as third tenant was concerned a decree for eviction was passed by the learned Munsif against him, against which he preferred an appeal which was pending at the time when the application under Section 34 of the West Bengal Premises Tenancy Act was made on behalf of the petitioners. The point that was taken before the Appellate Officer is this that after a notice under Section 13(6) of the West Bengal Tenancy Act determining the tenancies of the tenants petitioners were given by the landlord they ceased to be tenants in the strict sense of the term and, therefore, the relief u/s 34 of the Act could not be made available to them. This may apply so far as third petitioner against whom a decree for eviction had been given but the suits against other two petitioners having been withdrawn by the landlord and she having acknowledged them as tenants they are deemed to be in possession of the premises according to the provisions of Section 34 of the West Bengal Premises Tenancy Act and they can certainly make a prayer to be permitted to make the necessary repairs if the land-lord did not effect the same.

2. The third petitioner, however, cannot claim that relief in view of the definition of the word 'tenant' under Section 2(h) of the Act. Now a point was been taken on behalf of the opposite party in this case, that this application under Article 227 of the Constitution is not maintainable in view of the recent Amendment of the Constitution.

The Rent Controller is not a Court and is a persona designata. This has been held in several cases and that is well-settled and I need not quote those cases. But it has been argued on behalf of the present petitioners that u/s. 29(1) of the W.B.P.T. Act an appeal lies from every order passed by the Rent Controller to the District Judge, and therefore, it is contended that the District Judge is a Court within the meaning of Article 227(6) of the Constitution which is in the following term: "Nothing in this article shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision". The judgment must be the judgment of "a Court". If the Rent Controller is not a Court but a persona designata as I have already stated above, an appeal to the District Judge as provided u/s. 29(1) of the West Bengal Premises Tenancy Act does not make that judgment of the District Judge the judgment of a Court. An appeal is a continuation of the proceeding before the Rent Controller. The District Judge is an appellate Officer u/s. 29(3) of the said Act. As such, the present application under Article 227 is not maintainable.

3. Accordingly, the Rule is discharged. There will be no order for costs.

N. C. S.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Salil Kumar Roy Chowdhury

Decision : May 29, 1978

Bijan Bhusan Mukherjee Applicant

Versus

State of West Bengal & Ors. Respondent*

West Bengal Service Rules (Part-I.) Rule 72 (b), 74—West Bengal Service (Classification, Controls and Appeals) Rules, 1971—Articles 311, 302 of the Constitution.

On the 12th of August, 1959, the petitioner joined as a Lower Division Assistant of the Finance Department, Government of West Bengal. On the 1st of April 1964, the petitioner became permanent in the post of Lower Division Assistant. On the 22nd of November 1965, the petitioner promoted to officiate as the Upper Division Assistant. On 29th November 1973 the petitioner was confirmed in the Upper Division Assistant. It appears that by the Memorandum no. 5009-F dated the 21st May 1974, the Finance Department, Government of West Bengal issued an order laying down the principle for guidance of the Finance Department in respect of promotion, confirmation, crossing of Efficiency bar and several ancillary benefits in respect of Government employees regarding

*Matter No. 786 of 1977.

presence or absence of the days of "Bundhs", "Cease Work" or "Strikes". Prior to the said order by a Memo no. 7119-F, FIS- 25-72 dated the 1st December 1972, by an order of the Finance Department of Government of West Bengal, principles to be followed in matter of promotion was laid down. There is a change in the Government after the last general election in March 1977, and thereafter, by an order dated 8th July 1977 of the Finance Department, Government of West Bengal, certain clauses of the said order dated the 1st December 1972, were deleted and certain clauses were amended. By another order dated 23rd of April 1977 of the Finance Dept. Government of West Bengal, various circulars and Memorandum issued in connection with the implementation and operation of various orders were cancelled.

By an order dated the 8th October 1975, the petitioner along with other persons were appointed to officiate in the New/Intermediate Selection Grade Post of Upper Division Assistant which was created by an order dated the 18th of May 1975, with effect from 1st of August 1974. Thereafter, by an office order of the Finance Department, Government of West Bengal, dated 22nd day of December 1976, the petitioner and six other persons who were permanent U.D.A. officiating in the New/Intermediate Selection Grade post for U.D.A. were appointed provisionally to officiate in the post of Head Assistant in the Finance Department with effect from 20th December 1976 until further order against the vacancy shown against each of them. The petitioner appears to have been appointed as officiating in the post of Head Assistant in place of Panchu Gopal Mitra who was appointed Section Officer in the Finance Department. It also appears that by an order no. 6276-F of the Finance Department dated 28th July 1977, the suspension order of Nripendra Narayan Chakraborty, the respondent no. 5 herein was withdrawn and he resumed his duties on the 28th July 1977.

As a consequence thereof another order dated 1st September 1977 was issued reverting the petitioner to the post of U.D.A. New/Intermediate Selection Grade in the after-noon of 27th July 1977. The petitioner has challenged the said order dated 1st September 1977 under Article 226 of the Constitution. The Rule was made absolute.

HELD : (a) If there is any employee officiating in a particular post and due to resumption of office of another employee in the same post the requisite number is filled up and the question of the employee being reverted to his original post arises. But, if there is any leave vacancy for more than two months, as a general rule such leave vacancy should be filled up by the officiating employee who would have otherwise, had to go back to his original substantive post.

(b) Although in the case of respondent no. 6 a post was created after he came back as there was no berth available only with a view to not to leave him out, it was not done in the case of the petitioner. There was

no difficulty in retaining the petitioner in his officiating post as Head Assistant even the respondent no. 5 as there was a leave vacancy for more than 2 months.

(c) It is clear that inspite of specific orders made by this court in this application, the State Government has not carried out the same but by making appointments with retrospective effects has made an attempt to circumvent the said order ; if possible. In my view, the said orders have been both in substance and in spirit clear violation of this court's order and it would have been proper for the State Government to take leave of this Court before making such appointments which appears to be indirectly if not directly violating an order of this Court passed in this application.

(d) When a totally unauthorised Act which is without jurisdiction is challenged, the bar under Article 226(3) of the Constitution would not apply. The present writ petition seems to be the only possible remedy open to the petitioner to get any relief on proper grounds.

(e) Where the Government does not produce the Confidential Character roll it may be inferred that had it been produced nothing adverse against the petitioner could have been found.

(f) The petitioner should have been appointed in the leave vacancy, the State Government has created supernumerary post to avoid reversion an employee like respondent no. 6. But the petitioner being similarly situated was not given a berth there by creating a supernumerary post. This is a clear case of discrimination and is hit by Articles 14 and 16 of the Constitution.

(g) After the change of the Government in 1977, various Service Rules made by the previous Government have been altered, set aside or cancelled but whatever may be the policy of the political party in power, the security of the Government servants and the tenure of their, respective services should be maintained so as to ensure efficient, faithful and smooth running of the Government machinery by Government servants.

(h) Although reversion as such is not always reduction of rank, but where the employees suffer from penal consequences the petitioner is entitled to be protected by Article 311 of the Constitution.

(i) The impugned order of reversion is violative of Articles 14 and 16 of the Constitution.

Cases referred to :—

- (1) *State of Punjab v. Amar Singh Harika*, AIR 1966 SC 1316
- (2) *S. P. Basudeva v. State of Haryana*, AIR 1975 SC 2298
- (3) *Suresh Kumar & Anr. v. Union of India*, AIR 1969 Punjab 257
- (4) *M/s. Ureslan Equipment Chemical Limited v. State of West Bengal & Anr.*, AIR 1975 SC 266
- (5) *State of Mysore v. P. R. Kulkarni & Ors.*, AIR 1972 SC 2170
- (6) *State of U. P. & Ors. v. Sughar Singh*, AIR 1974 SC 423
- (7) *State of Bihar v. Shiva Bikkhu Misra*, AIR 1971 SC 1011

- (8) *M/s. Laxman & Co. v. Dr. Anand R. Deshpande & Anr.*, AIR 1973 SC 171
 - (9) *Purusattam Lal Dhingra v. Union of India*, AIR 1958 SC 36
 - (10) *Madhab Laxman Bhai Kunthi v. State of Mysore*, AIR 1962 SC 8
 - (11) *State of Rajasthan v. Ramswaran*, AIR 1964 SC 1361
 - (12) *The Division Personnel Officer S.E.R. Mysore v. S. Raghaden-drachari*, AIR 1966 SC 1259
 - (13) *G. S. Gill & Ors. v. State of Punjab & Ors*, AIR 1974 SC 1898
 - (14) *Gurudeb Singh v. State of Punjab*, 1971(3) SCC- 324
 - (15) *R. Rajiah v. Inspector of Municipal Council & Local Boards, Madras*, AIR 1955 Madras, 584
 - (16) *Bhartia Electricity Steel Company Limited v. Commercial Tax Officer & Ors*, AIR 1956 Cal.-299
 - (17) *R. S. Sial v. The State of U. P. & Ors.*, AIR 1974 SC 1317
- Bholanath Sen and Uma Prosad Mukherjee* for petitioner
Somnath Chatterjee and Nigam Chakravorty ...for respondents Nos. 5 & 6
N. N. Goptu and S. L. Saraf for State

The judgment of the Court was as follows :—

This is a writ petition challenging an order of reversion dated the 1st of September, 1977, on the ground *inter alia*, of mala fide, discriminatory, violative of Article 311(2) of the Constitution of India, illegal, irregular, violative of the principles of natural justice and bad in law. It is also challenged on the ground of withholding the salary of the petitioner for the month of August, 1977, which act amount to punishment.

The relevant facts appear to be as follows :—

2. On the 12th of August, 1959, the petitioner joined as a Lower Division Assistant of the finance dept., Govt. of West Bengal. On the 1st of April, 1964, the petitioner became permanent in the post of Lower Division Assistant. On the 22nd of November, 1965, the petitioner was promoted to officiate as the Upper Division Assistant. On the 29th of November, 1973, the petitioner was confirmed in the Upper Division Assistant post. It appears that by the Memorandum No. 5009-F dated the 21st of May, 1974, the finance dept. of Govt. of West Bengal issued an order laying down the principles for guidance of the finance dept, in respect of promotion, confirmation, crossing of efficiency bar and several ancillary benefits in respect of government employees regarding presence or absence on the days of "Bundhs", "Cease Work" or "Strikes". The relevant portion is set out hereunder :—

"In deciding the cases of promotion, confirmation, crossing of efficiency bar and other marginally noted ancillary benefits in respect of Government Employees, there presence or absence on days of "Bundhs", "Cease Work" or "Strikes" shall also be taken into consideration along with other relevant factors. In this connection attention is drawn to

Rules 3B and 3C of the West Bengal Service Rules Part 1 and Rule 27 of the West Bengal Government Servants Conduct Rules, 1959.

In all pending cases of promotion, confirmation, crossing of efficiency bar and other marginally noted ancillary benefits, no order shall be passed and no order in this respect which has not yet been implemented shall be implemented until the records of the employees concerned are verified and all relevant factors including his attendance and non-attendance on days when calls for "Bundhs", "Cease Work" or "Strikes" were given are ascertained. A sample form with a set of likely entries in this respect is enclosed herewith for guidance and use.

The Commissioner or Secretary concerned for each department shall take steps to ensure that the above directions are complied with in all offices under his control from the Secretariat to the Directorate, district and all subordinate levels".

3. It also appears that (prior to the said order by a Memo No. 7119-F. FIS-25-72 dated the 1st of December, 1972, by an order of the finance dept. of Govt. of West Bengal principles to be followed in matter of promotion was laid down) which is set out hereunder :

Government of West Bengal

Finance Department

Audit Branch

No. 7119-F-FIS-25-72.

Calcutta, 1st December, 1972

MEMORANDUM

Subject : Principles to be followed in the matter of promotion.

4. For some time past the question of laying down a uniform principle to be followed in the matter of promotion was under consideration of the government. The matter has been carefully considered and governor has been pleased to lay down the following principles for guidance of all concerned in supersession of previous order.

(a) A government servant should be selected for promotion on grounds of merit and suitability in all respect and not of seniority.

(b) Seniority should be taken into account only when it is impossible to choose between two or more persons on grounds of merit alone.

2. It is considered necessary to indicate some guidelines in determining merit. The following factors should therefore be taken into consideration in deciding merit, :

(a) The annual confidential report of the competent officer in the prescribed form should be given due weight in considering cases of promotion taking into account reports relating to paragraphs (b) and (c) below.

(b) Satisfactory work based on periodical reports which in case of certain categories should involve report on maintenance of case records, diaries etc. and on out put of work according to the approved norm.

(c) The conduct of government servants who resort to cease work and or indulge in acts of indiscipline like slogan shouting, holding meeting etc. within office premises during the prescribed office hours and or resort to or in any way abet strike for any period in violation of the provisions in Rule 3(C) of West Bengal Service Rules, Part I, and Rule 27 of West Bengal Govt. Servants Conduct Rules.

3. It is further impressed on all authorities empowered to appoint a Govt. servant on promotion that

(a) Promotion should be regarded as being made in the interest of the public service and not of the individuals,

(b) In choosing a man for promotion the criterion should be the good which the organisation will stand to gain by the promotion of the particular man rather than another ;

(c) A man should be promoted not as a reward for the good work which his record may show him to have done in the past, but in the expectation to which his past record may justifiably give rise that he will do good work in future in the post to which it is proposed to promote him.

Sd/-S.R. Das

Financial Commissioner and
Secretary.

5. It can be judicially noticed as a notorious fact that there is a change in the government after the last general election in March, 1977, and thereafter, by an order dated the 8th of July, 1977 of the finance dept., Government of West Bengal, certain clauses of the said order dated the 1st of December, 1972, were deleted and certain clauses were amended. The said order is set out hereunder :—

Government of West Bengal
Finance Department
Audit Branch

No. 5651-F

Calcutta, 8th July. 1977

MEMORANDUM

The question whether the provision contained in para 2(c) of this Dept. Memorandum No. 7119-F dated the 1.12.72 should continue to operate in the context of withdrawal of this Department Memo No. 5009-F dated 21.5.74 and No. 3060(36)-F dated 10-4-76 has been under consideration of Government for sometime past. After due consideration the Governor has been pleased to decide that clause (c) in para 2 of Finance Department Memo No. 7119-F dated 1.12.72 shall be deleted. Consequently in clause (a) and (c) the words paragraph (b) shall be substituted.

Sd/- A.K. Mukherji

Special Commissioner & E O. Secretary to
the Government of West Bengal Finance
Department.

6. It also appears that (by another order dated the 23rd of April, 1977, of the Finance Dept. Govt. of W.B., various circulars and memorandum issued in connection with the implementation and operation of various orders were cancelled.) The said order dated the 23rd of April, 1977, is set out hereunder :

(To be substituted for the Order bearing the same number and date)

Government of West Bengal

Finance Department Audit Branch

No. 3414-F. Dated, Calcutta, 23rd April, 1977.

MEMORANDUM

The Governor is pleased to decide that Finance Department Memo No. 5009-F dated 21.5.74 and No. 3060(36)-F dated 10.4.76 will cease to be operative with immediate effect.

- | | |
|------------------------------------|---------------------------------|
| 1. No. 5716-F dt. 16.8.75 | All other Circulars and Memo- |
| 2. No. 6392-F dt. 8.9.75 | randa issued in connection with |
| 3. No. 6930-F dt. 30.9.75 | the implementation of the above |
| 4. D O. No. 455(25)/76-CS | two Memoranda including those |
| dt. 31.5.76 | noted in the margin are hereby |
| 5. No. 5503(36)-F dt. 18.6.76 | cancelled. |
| 6. D.O. No. 620/76-CS dt. 29.7.76. | |

Sd/- A. K. Mukherji.

Special Commissioner & Ex-Officio
Secretary, Finance Department.

7. By another order being Memo. No. 5652/F dated the 8th of July, 1977, as a follow up of the cancellation and withdrawal of various previous orders passed by the Government under the previous regime, decision and principles in respect of employees of the Finance Dept. were laid down. The said order is set out hereunder :

Government of West Bengal

Finance Department

Audit Branch

No. 5652-F.

MEMORANDUM

Calcutta, 8th July, 1977.

In the context of withdrawal of Finance Dept. Memo. No. 5009-F dated the 21st of May, 1975, and No. 3060(36) dated 10.4.76 and cancellation of other ancillary circulars under this department Memo. No. 3414-F dated 23.4.77 the question whether any retrospective effect can be allowed to the affected employees in respect of benefits like crossing of efficiency bar, appointment of New/Intermediate selection Grade, promotion to higher posts, confirmation in service/post, declaration of quasi permanent service, or service with permanent status, bringing to class IV contingency

staff under regular temporary establishment and absorption of work-charged staff in the regular establishment has been under consideration of Government for some time past.

After careful consideration of the matter the Governor has been pleased to decide as follows :—

1) The competent authorities may permit the employees to cross efficiency bar with retrospective effect from the due date subject to usual conditions, Arrear payments if any, shall be allowed in such cases.

2) The competent authorities may appoint the affected employees to New/Intermediate Selection Grades with retrospective effect where vacancies remain unfilled subject to fulfilment of other conditions.

3) The competent authorities may give such employees promotion to Higher posts with retrospective effect if vacancies remain unfilled subject to fulfilment of other conditions.

4) The competent authorities may confirm a Govt. servant in a cadre/post with retrospective effect if suitable vacancy remains unfilled or be available subject to fulfilment of usual conditions.

5) The competent authorities may declare temporary government employees to be in quasi-permanent service or in service with permanent status with retrospective effect subject to fulfilment of usual conditions.

6) The competent authorities may bring class IV contingency staff under regular temporary establishment with retrospective effect and also absorb work-charged staff in the regular establishment with retrospective effect provided other requirements are fulfilled.”

In the mean time, there was an order dated the 29th of June, 1977, issued by the Government of West Bengal Home Dept., Political, laying down the terms and conditions of reinstatement of dismissed employees *inter alia* on political grounds which are as follows :—

Government of West Bengal

Home Department

Political

No. 1583-PS

Order

Calcutta

The 29th June, 1977.

8. The undersigned is directed by order of the Governor to say that the Government have since reviewed the policy relating to the case of State Government Employees, other police personnel, who had been dismissed from service in the past by invoking provisions of proviso (c) of Articles 31(2) of the Constitution of India. It has been decided that all such State Government employees who were so dismissed from services should be reinstated immediately.

2. The undersigned is also directed by order of the Governor to say that the Governor has been pleased to lay down the following terms and conditions for reinstatement :

(i) That the period between the date of dismissal from service and the date of joining in respect of each of such employees shall be treated as duty for the purpose of leave, increment, promotion, seniority, pension and other service and retirement benefits :

(ii) That for the intervening period the employee shall be paid full pay and other admissible allowances to which he would have been entitled if he had not been dismissed ;

(iii) That where the reinstated Government employees has secured employment during any period between dismissal and joining the amount payable to him after reinstatement for the intervening period shall be reduced by the emoluments earned by him during such employment.

(iv) That while making the payment to the employees concerned the actual amount of compassionate allowances paid to him according to the order of Court or otherwise if any, during the intervening period should be recovered in full.

(v) That the head of the concerned department is hereby authorised to create such permanent or temporary post as may be necessary where no suitable post is available to accommodate a specified employee now reinstated, subject to the conditions that such post will be adjusted against the next available vacancy.

3. This has the concurrence of the Finance Dept. vide their U/O No. Group P MISC 274 dated the 28th of June, 1977."

9. Therefore, it is quite clear from the above that with the change of the government there were changes in the policy and principles for appointment, promotion etc. of the government employees in the Finance Department.

10. It appears that by an order dated the 8th of October, 1975, the petitioner along with other persons were appointed to officiate in the New/Intermediate Selection Grade Post of Upper Division Assistant which was created by an order dated the 18th of May, 1975, with effect from 1st of August, 1974. Thereafter, by an office order of the Finance Dept., Govt. of West Bengal dated the 22nd of December, 1976, the petitioner and six other persons who were permanent U.D.A. officiating in the New/Intermediate Selection Grade Post for U.D.A. were appointed provisionally to officiate in the post of Head Assistant in the Finance Dept. with effect from 20th of December, 1976, until further order against the vacancy shown against each of them. The petitioner appears to have been appointed as officiating in the post of Head Assistant in place of Panchu Gopal Mitra who was appointed Sectional Officer in the Finance Department. It also appears that by an order No. 6276-F, of the Finance Dept., Govt. of West Bengal, dated the 28th of July, 1977, the suspension order of Nipendra Nirayan Chakrabarty the Respondent No. 5 was withdrawn and he resumed his

duties on the 28th of July, 1977. As a consequence thereof the impugned order of the Finance Dept. being No. 7745-F dated the 1st of September, 1977, was issued. The said order is set out hereunder :

Annexure "B"

Government of West Bengal

Finance Department

Audit Branch

No. 7745

Calcutta, 1st of September, 1977.

ORDER

Consequent upon the withdrawal of the order of suspension of Shri Nripendra Narayan Chakrabarty, Head Assistant, of this Dept. (Vide Office Order No. 6276-F dated 28.7.77) and his resumption of duties on 28.7.77 the Juniormost officiating Head Assistant of this Department Shri Bijon Bhusan Mukherjee, is reverted to the post of Upper Division Assistant (New/Intermediate Selection Grade) in the afternoon of 27.7.77.

Sd/- N. R. Bhattacharyya

Deputy Secretary to the
Government of West Bengal

11. It also appears that by another order of the same date, that is, 1st of September, 1977, a temporary post was created in the U.D.A. in the New/Intermediate Selection Grade over and above the admissible strength on the basis of the prescribed percentage. This order was passed, as alleged by the petitioner, only to accommodate the Respondent No. 6, Biswajit Das. It appears that the petitioner has made representation for allowing him to officiate in the leave vacancy in the post of Head Assistant as there was clearly one leave vacancy and he also submitted that he should not be reverted to his original post. The said letter is set out hereunder :

To

The Special Commissioner &

Secretary,

Finance Department,

Government of West Bengal,

Writers Buildings,

Calcutta.

Sir,

With due respect I beg to submit the following fact for your kind immediate action.

That I am, permanent U.D. Assistant holding Selection Grade and Offg. as Head Assistant in the Finance Dept. from 20.12.76. On 28.7.77, Shri Nripendra Narayan Chakraborty, a suspended H.A., of this Dept. joined in this Dept. and consequently the question of reversion from the post of H. A. has arisen and for this purpose, a proposal for the

creation of a supernumary post of H.A. in this dept. in order to save the hardship of the Juniormost Head Asstt. of this dept. from reversion is under consideration of Govt. in this dept.

Now, since I being the juniormost H.A. of this Dept. the question of reversion from the post of H. A. has arisen in my case and accordingly my name is being shown in the Acting Arrangement as U.D.A (S.G.) for drawal of my pay for the month of January, 1977.

There is leave vacancy in this dept. w.e.f. 28.7.77 due to the taking of leave of one of H.A. of this dept. for more than two months. It is the age old practice of the Secretariat that the juniormost H.A. instead of reversion is allowed to officiate in such leave vacancies. But in my case, this procedure is not being followed and I am going to be reverted even when there is clear one leave vacancy in this dept.

I, therefore, pray that you will kindly consider my case and allow me to officiate in the leave vacancy in the post of Head Asstt. in order to save me from pecuniary losses in case of my reversion to the post of U.D. Asstt.

Hope, you will do the needful and oblige.

Calcutta,

The 9th August, 1977.

Yours faithfully,

Sd/-Bijan Bhushan Mukherjee.

12. It is an admitted position that the petitioner worked as U.D.A. up to 31st of August, 1977, and his salary was withheld without any reason being given to him and he made a representation by a letter dated the 31st of August, 1977 a copy of which is set out hereunder :—

To
The Financial Commissioner &
Secretary,
the Govt. of West Bengal,
Writers Buildings,
Calcutta.

Sir,

With due respect I beg to state the following facts for your information and necessary action.

That I am permanent Upper Division Assistant holding selection grade and officiating as Head Asstt. in the Finance Dept. But it is surprising to me that to-day when all the employees of the Finance Dept. are drawing their salary, I have, for reasons not known to me, been deprived of my legitimate due. On enquiry I understand that my name was not included in the salary bill for the month of August, 1977.

Sir, I attended office regularly throughout the month. I have worked regularly in the office upto 7.30 P.M. to 8 P.M. throughout the month for the preparation of Budget estimates etc. As far as I knew I have committed no such fault that can prevent the Govt. from paying me my regular monthly salary.

In these circumstances I pray to your good-self to take such

action as deemed necessary so as to enable me to draw my salary immediately and maintain my family as usual.

Calcutta,
Dated The 31st August,
1977.

Yours faithfully,
Sd/-Bijan Bhusan Mukherjee
Head Assistant,
Finance (Budget) Deptt.

13. Thereafter, the petitioner moved this writ petition on the 2nd of September, 1977, and Rule was issued in terms of prayers (a), (b) and (c) and it was made returnable four weeks thereafter. It also transpires that by an order dated the 7th of September 1977, made by this Court in this application the petitioner was directed to be paid by the Respondent his salary as Head Assistant for the month of August, 1977, and no post of Head Assistant to be filled up until the hearing of this Rule. It now transpires that subsequently by a series of orders all dated the 28th of December, 1977, temporary posts were created in the Finance Dept. and several appointments were made. Those orders all dated the 28th of December, 1977, are set out hereunder :—

Govt. of West Bengal
Finance Dept.
Audit Branch.
No. 11400-F

From : Shri N. R. Battacharyya
Deputy Secretary.

To : The Accountant General,
West Bengal.

The 28th December, 1977.

Sir,

I am directed by order of the Governor to say that the Governor has been pleased to sanction the creation of two temporary posts of Section Officer in Finance Dept. in the usual scale of pay and allowances one with effect from 1.6.74 and the other from 10.2.75 and upto 28.2.78 for the present. These posts will be adjusted against the next available vacancies in the temporary post of Section Officer.

The charges will be met from the appropriate Head under "252-Sectt. General Services-I Sectt. (2)-Finance Department" in the State Budget.

Yours faithfully,
Sd/- N.R. Bhattacharyya,
Deputy Secretary to the Govt.
of West Bengal.

No. 11400/1(1)-F

dated 28.12.77.

Copy forwarded for information to the Accounts Officer, West Bengal Secretariat.

Deputy Secretary to the Govt. of West Bengal.
Govt. of West Bengal
Finance Dept.
Audit Branch.

No. 11406-D.

Calcutta the 28th Dec., 1977.

NOTIFICATION

Shri Nripendra Narayan Chakrabarty, Head Assistant of this Department is hereby appointed to officiate in the post of Section Officer of this dept. in the scale of Rs. 600-860/- plus special pay of Rs. 50/- per month created in G.O. No. 11400-F dated the 28.12.77 with effect from 1.6.74 and until further order.

Sd/- N.R. Bhattacharyya
Deputy Secretary to the
Government of West Bengal.

No. 11406/1(3)-F.

Copy forwarded for information to :

1. The Accounts Officer, West Bengal Secretariat,
2. The Accountant General, West Bengal,
3. Shri Nripendra Narayan Chakrabarty, Head Assistant:

Sd/-N.R. Bhattacharyya
Deputy Secretary to the
Government of West Bengal.

Government of West Bengal
Finance Department
Audit Branch.

Calcutta
The 28th Dec., 1977.

OFFICE ORDER

Shri Bhabotosh Roy, permanent Upper Division Assistant of this Dept. is hereby appointed to officiate in the post of Head Assistant of this Dept. against the post created in G.O. No. 11401-F dated 28.12.77 with effect from 17.3.72 & until further orders.

2. Shri Bhabotosh Roy is also hereby confirmed in the permanent post of Head Assistant of this Department created in G.O. No. 11401-F dated 28.12.77 with effect from 19.12.75.

Sd/- N.R. Bhattacharyya
Deputy Secretary to the
Government of West Bengal.

No. 11407/1(3)-F

Copy forwarded for information to :

1. The Accounts Officer, West Bengal Secretariat
2. The Accountant General, West Bengal.
3. Shri Bhabotosh Roy. U.D. Assistant.

Sd/- N.R. Bhattacharyya
Deputy Secretary to the
Government of West Bengal.
Government of West Bengal
Finance Department
Audit Branch

No. 11409-F

Calcutta, the 28th December, 1977.

OFFICE ORDER

Shri Ashoke Lal Sengupta, Permanent New/Intermediate Selection Grade Upper Division Assistant, of this department is hereby appointed to officiate in the post of Head Assistant in this Dept. with effect from 20.12.75 and until further order vice Shri Bhabotosh Roy, appointed as Section Officer of this dept. vide Notification No. 11408-F dt. 28.12.77.

Sd/- N.R. Bhattacharyya
Deputy Secretary to the
Government of West Bengal.

No. 11409/1(3)-F.

Dated, 28th December, 1977.

Copy forwarded for information to :

1. The Accounts Officer, West Bengal Secretariat.
2. The Accountant General, West Bengal,
3. Shri Ashoke Lal Sengupta, U. D. Asstt. Finance Dept.

Sd/- N. R. Bhattacharyya,
Deputy Secretary to the
Government of West Bengal.

14. It may be noted here that in course of the hearing both Mr. B. N. Sen, appearing for the petitioner, and Mr. Naranarayan Gupta, appearing for the Respondent No. 1, State of West Bengal and other Respondents and Mr. Somenath Chatterjee, appearing for the Respondent No. 6, exchanged remarks regarding the undue preference and favouritism shown by the political party in power during the periods, that is, prior to March, 1977, and subsequent thereto and in fact it was alleged on behalf of the Respondents that the petitioner was given undue preference by showing favouritism for his support to the political party then in power and he did not deserve the promotion and in fact, he superseded various other persons including the Respondent No. 6 for whom Mr. Somenath Chatterjee was appearing. Having regard to the said heated altercations from the Bar I directed the Respondents to produce the C. C. Roll of the petitioner so as to verify whether there is any adverse remark in the said roll, but it may be noted nothing has been produced. On the other hand it is being alleged that the orders of the Chief Secretary were passed in the usual course of the government administration of the department

whereas the petitioner alleged that the same was done under the pressure of the Co-ordination Committee which is the supporter of the present political party in power. Be that, as it may, the Court is only concerned whether any injustice, illegality, irregularity or violation of the norms and Rules has been perpetrated in this particular case reverting the petitioner to his original post in the facts and circumstances of this case. It will be convenient to set out the relevant Service Rules which have been referred to by both the parties. The West Bengal Service Rules, Part I Rules 72, 72(B) and 74.

"72. Payment and allowances on reinstatement—

(1) When a Government servant has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order—

(a) Regarding the pay and allowances to be paid to the government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be; and

(b) Whether or not the said period shall be treated as a period spent on duty.

(2) Whether the authority competent to order reinstatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be.

(3) In a case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.

...
(5) In a case falling under sub-rule (4) the period of absence may be treated as a period spent on duty or leave unless the competent authority specifically directs that it shall not be so treated for any specified purpose.

Note : The order of the competent authority under sub-rule (5) shall be absolute and no higher sanction shall be necessary for the grant of—

(a) extraordinary leave in excess of three months in the case of temporary government servants,

(b) leave of any kind in excess of five years in the case of permanent or quasi-permanent Government servant.

Pay and allowances on reinstatement by competent authority—
72B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order—

(a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement or the date of retirement on superannuation, as the case may be ; and

(b) whether or not the said period shall be treated as a period spent on duty.

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified the Government servant shall, subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled, had he not been suspended.

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

74. Leave may not be granted to a Government servant while he is under suspension or committed to prison.

Note : 1. This rule does not prevent the grant to a Government servant on the termination of the period of his suspension or of the proceedings in connection with which he was committed to prison, of leave for the period of his suspension or committal to prison.

Note 2 : In an establishment where provision for leave reserves exists any vacancy caused on account of the suspension of a Government servant or of his committal to prison for debt or on a criminal charge should be filled by a reservist and where a "reservist" is not available, the post should, subject to the provision of Note 1 below rule 55, be filled by an officiating appointment. It is, however, not necessary to create an extra post.

West Bengal Services (Classification, Control and Appeal) Rules. 1971.

Part :—V-Discipline

8) Penalties :—The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely

- (i) Censure ;
- (ii) withholding of increments or promotions ;
- (iii) recovery from pay of the whole or part of any pecuniary loss caused to the Government by negligence or breach of orders ;
- (iv) reduction to a lower stage in the time-scale of pay for a specified period with further direction as to whether or not the Government servant will earn increments of pay during the period of such

in a particular post and due to resumption of office of another employee in the same post the requisite number is filled up and the question of the employee being reverted to his original post arises, but if there is any leave vacancy for more than two months, as a general rule such leave vacancy should be filled up by the officiating employee who would have otherwise, had to go back to his original substantive post. In fact, in the present case the petitioner, Bijan Bhusan Mukherjee, submitted a memorial on which notes and orders of the Finance (Budget) Department in its file were made; an extract from which had been annexed to the affidavit of Bijan Bhusan Mukherjee affirmed on the 20th of March, 1978, relevant portion of which is set out hereunder :—

“It appears from the statement of Shri Mukherjee that consequent on the joining of Shri Nripendra Narayan Chakraborty, a suspended Head Asstt., the question of reverting the Juniormost H.A. who is unfortunately Shri Mukherjee has cropped up. But we understand that there is a leave vacancy in the post of H.A. and as such he may be allowed to continue to officiate against the vacant post available now as has been the usual practice followed hitherto in such cases in the Finance Deptt. Shri Mukherjee has been efficiently officiating for a pretty long period and in this view it will be a pitiful thing if he has to revert now inspite of a berth being available.”

15. From the above facts it clearly appears that when a suspended employee coming back and joining his post after a period of about six years the question of an officiating juniormost employee in the said post being reverted arose and as a general rule if there would have been a leave vacancy for more than two months as was in this case, the said juniormost officiating Officer being the petitioner should have filled up the said leave vacancy so as to avoid the reversion or in some cases such reversion could be avoided by creating a supernumerary post. In fact, in the case of Respondent No. 6, Biswajit Das, such a post was created after he came back as there was no berth available only with a view to not to leave him out. Therefore, *prima facie*, it appears that there was no difficulty in retaining the petitioner in his officiating post as Head Assistant even the said Respondent No. 5, Nripendra Narayan Chakraborty against whom order of suspension was withdrawn and rejoined his original post as Head Assistant there being a leave vacancy for more than two months. It further appears that the said Nripendra Narayan Chakraborty for all practical purposes was not really meant to be in the post of Head Assistant as appeared from the subsequent events and orders of the State Govt. which have been set out before. Not only he was brought back in his original post but very soon thereafter by an order dated the 28th of December, 1977, he was promoted to the post of Section Officer with effect from 1st of June, 1974. It further appears that inspite of specific interim order in this application that no appointment in the post of Head Assistant

to be made till the disposal of this application, by an order dated the 28th of December, 1977, an order was made appointing one Mr. Bhabotosh Roy as officiating Head Assistant with effect from 17th of March, 1972, and by the very same order he was confirmed in the said post of the Head Assistant with effect from 19th of December, 1975 and also another employee Asoke Lal Sengupta was given an officiating appointment as Head Assistant with effect from 20th of December, 1975, by an order dated the 28th of December, 1977. Those orders have been set out hereinbefore. From the above it is clear that inspite of specific orders made by this Court in this application, the State Govt. has not carried out the same but by making appointments with retrospective effects has made an attempt to circumvent the said order, if possible. In my view, the said orders have been both in substance and in spirit clear violation of this court's order and it would have been proper for the State Govt. to take leave of this Court before making such appointments which appears to be indirectly if not directly violating an order of this Court passed in this application.

16. Mr. B. N. Sen, appearing with Mr. Shyamal Sen and Mr. Uma prasad Mukherjee, for the petitioner, submitted that on the 28th of July, 1977, when one suspended Section Officer and one suspended Head Assistant were reinstated in the Finance Dept, there were one vacancy in each of the two categories. In the case of the Section Officer according to Rule the Junior-most Section Officer Panchu Gopal Mitra was absorbed in the vacant post and there was no order of reversion in his case. Mr. B. N. Sen, therefore, submitted that according to the General Rule which has been referred to earlier the Junior-most Officiating Head Assistant, the petitioner Bijan Bhusan Mukherjee, should also have been absorbed in the vacant post but in violation of General Rule the petitioner was reverted to his substantive post of selection grade Upper Division Head Assistant. According to Mr. Sen that this was a discriminating attitude of the Finance Department contrary to the existing General Rule. Mr. Sen Submitted that Mr. Mukherjee, the petitioner, should have been treated in a similar manner as the said Panchu Gopal Mitra in whose place the petitioner was appointed on the 22nd of December, 1976. It is alleged by Mr. Sen that the same was done due to the pressure of the Co-ordination Committee. Mr. Sen referred to the fact that the petitioner Mr. Mukherjee was recommended for being absorbed in the leave vacancy by Mr. B. C. Dutta, Assistant Secretary, Mr. A. C. Basu, Deputy Secretary and Mr. N. K. Pal, Joint Secretary in their notes which have been set out before. Further, Mr. Sen submitted that there is no adverse remark in the C. C. Roll of the petitioner, neither any proceeding was drawn against him and the reversion in those circumstances amounted to penalty. Mr. Sen further submitted that after the alleged

reversion of the petitioner, Bijan Bhusan Mukherjee, in his substantive post of Selection Grade Upper Division Assistant, the said Mr. Biswajit Das who was the juniormost in the Selection Grade Upper Division Assistant should have been reverted to his substantive post of Upper Division Assistant as there was no vacancy in the post of Selection Grade Upper Division Assistant. But inspite of that a supernumerary post was created to retain the said Mr. Biswajit Das in his officiating post in the Selection Grade Upper Division Assistant. Therefore, Mr. Sen submitted that the petitioner, Bijan Bhusan Mukherjee was not given the benefit of supernumerary post as the said Biswajit Das was given and therefore, the said act of reversion was a discriminatory act and should be struck down. He alleged that the same was due to the pressure of the Co-ordination Committee as the notices and orders were pasted as will appear from the file. Here it may be noted that the Respondents submitted that the pasting of orders is the usual in the Govt. files. Mr. Sen Submitted that the petitioner worked in the Finance Dept. as Head Assistant for the month of August, 1977, and he was signing the attendance Register of Head Assistant and was performing the duties of Head Assistant and files were being marked to him as Head Assistant. Therefore, Mr. Sen submitted that in this context an order dated the 1st of September, 1977, reverting him to Selection Grade Upper Division Assistant with retrospective effect from 27th of July, 1977, is illegal and should be set aside. Mr. Sen further submitted that Mr. Mukherjee, the petitioner, is a permanent Govt. employee and worked as a Head Assistant for the month of August, 1977, but no salary bill for the petitioner has been prepared and drawn by the Finance Dept. for the month of August, 1977, but he was paid only after an order was made by this court in this application. In those circumstances Mr. Sen submitted that the order of reversion of the petitioner being dated the 1st of September, 1977, is highly discriminatory, mala fide, illegal and against the General Rule and therefore, should be set aside. Mr. Sen submitted that in the facts and circumstances of this case it is quite clear that the order of reversion of the petitioner from the post of Head Assistant in which he was officiating in the vacancy of Panchu Gopal Mitra on the ground of the said Nripendra Narayan Chakraborty substituting the petitioner on the withdrawal of his suspension order is absolutely mala fide. Mr. Sen submitted that it has been specifically pleaded that the said order of reversion was mala fide in paragraphs 14 and 17 sub-paragraphs (v), and (vii). Mr. Sen therefore, submitted that the said order of reversion coupled with the withholding of salary, puts the petitioner with the evil consequence of loss of pecuniary benefit, it is discriminatory and amounting to a and therefore, violative of Article 311(2) of the constitution of India. In support of his contention Mr. Sen cited several decisions

Mr. Sen also submitted that the said order of dismissal was not communicated to the petitioner before the present writ petition was moved and he cited a decision in the (1) *State of Punjab v. Amar Singh Harika*, AIR 1966 SC 1316 where it has been laid down that the said order of dismissal passed against an Officer on a particular date cannot be said to have taken effect until he came to know about it. Thereafter, Mr. Sen cited the Supreme Court decision in (2) *S. P. Basudeva v. State of Haryana*, AIR 1975 SC 2298 where it has been held that a question of reversion from a higher post to a lower post cannot be questioned except on the basis of malafide in the making of the order. Mr. Sen submitted that in the facts of this case having regard to the manner and mode of reversion of the petitioner is nothing but malafide exercise of the power by the Respondent No. 1 only to victimise the petitioner and therefore, the order should be set aside as bad and violative of Article 311(2) of the Constitution of India. On the question of an order being discriminatory the Court has jurisdiction to grant relief Mr. Sen cited a Punjab decision in (3) *Suresh Kumar & Anr. v. Union of India*, AIR 1969 Punjab 257. Mr. Sen also cited a Supreme Court decision in (4) *M/s. Uresian Equipment & Chemical Limited v. State of West Bengal & Anr.* AIR 1975 SC 266 where a Government Contractor challenged an order placing it in the black list it was held that the fact of black listing indicates that the authority is to have an objective satisfaction. Fundamental of fair play requires that the person concerned should be given an opportunity to represent his case before he is put on the black list. The Government cannot chose to exclude a person by discrimination. The order of black listing has the effect of depriving a person of equality of opportunity in the matter of public contract when the State acts to the prejudice of the person which has to be supported by legality. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling. Where a black listing involves civil consequences it cast a slur. It creates a barrier between the person black listed and the Government in the matter of transaction. Black lists are the instruments of co-ercion. Such a person must be given an opportunity of hearing before his name is to be on the black list. Relying on the said decision Mr. Sen rightly submitted that the order of reversion in the facts and circumstances of this particular case amounts to putting a slur on the petitioner having regard to the fact that there being an existing leave vacancy which as a general rule should have been filled up by the petitioner, the juniormost officiating Head Assistant or by creating a supernumerary post, as it was done in the case of the Respondent No. 6, Biswajit Das, it amounts to a discrimination, malafide and colourable exercise of the power by the Respondents and therefore, has penal consequences and without giving an opportunity to the petitioner, such an order is violative of the principles

of fundamentals of fair play, natural justice and Article 311(2) of the Constitution of India. Mr. Sen also cited a decision in the case of (5) *State of Mysore v. P.R. Kulkarni & Ors.* AIR 1972 SC 2170 where it was held that if the power of reversion is used for a collateral and illegally extraneous purposes, the reversion order resulted in an unjustifiable discrimination against the employees and was struck down under Articles 14 and 16 of the Constitution of India. Mr. Sen rightly submitted that here also the Respondent No. 1, State of West Bengal, and the Respondent Nos. 2, 3 and 4 have caused the said order of reversion issued against the petitioner for a collateral and extraneous purposes other than administrative grounds unconnected with the conduct of the petitioner. Mr. Sen submitted that it is only for the purpose of petitioner being victimised and the Respondent Nos. 5 and 6 being rewarded due to the change in the political power governing the State. Mr. Sen very strongly relied on the decision in (6) *The State of U.P. & Ors. v. Sughar Singh*, AIR 1974 SC 423 where the petitioner alone was reverted from his officiating post to his substantive post allowing other who were junior to him to retain their officiating posts and the basis of such reversion was admitted to be an adverse entry in his character roll and the order of reversion was by way of punishment and amounted to reduction in rank. The order was alleged to be violative of Articles 14 and 16 of the Constitution of India. It was observed by the Supreme Court that an order of reversion is in its immediate effect bound always to a reduction in rank. Even a reversion from a higher but temporary and officiating rank to a lower substantive rank is in a sense reduction. But such reversions are not always "reduction of rank" within the meaning of Article 311 of the Constitution of India. It was held that the real test in such cases is to ascertain if the Officer concerned has a right to the post from which he is reverted. If he has a right to the post, then reversion is a punishment and cannot be ordered except in compliance with the provisions of Article 311 of the Constitution of India. If, on the other hand, the Officer concerned has no right to the post he can be reverted without attracting the provisions of Article 311 of the Constitution of India. But even in that case he cannot be reverted in a manner which will show conclusively that the intention was to punish him. The Supreme Court laid down the principle as follows :

"In considering the question whether an order of reversion from an officiating post to the substantive post is by way of punishment, the Court is concerned only with the question if the order entails any penal consequences. The motive behind the reversion is not relevant."

17. Mr. Sen submitted that applying the test laid down in the said Supreme Court decision to the facts of this case it should be held that the said order of reversion amounted to a punishment of the petitioner and rewarding the Respondent Nos. 5 and 6 and therefore, it is violative of Article 311 of the Constitution of India. Mr. Sen also relied on the Supreme Court decision in (7) *The State of Bihar v. Shiva Bikkhu Misra*, AIR 1971 SC 1011 where it has been laid down that for the applicability

of Article 311 of the Constitution of India it is not necessary that there should be express words of stigma attributable to the conduct of a Govt. servant in the impugned order. There is no rigid principle that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching stigma to the character or reputation of a Govt. Officer, it must be held to have been made in the ordinary course of administrative routine and the Court is debarred to look into at the attendant circumstances to discover whether the order has been made by way of punishment. A form of order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuous and does not contain any imputation of misconduct is a circumstances or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order. Mr. Sen rightly submitted that applying the said principle and test to the present case by taking into account the entirety of circumstances preceding or attendant on the said impugned order of reversion, it will be clear that the petitioner has been discriminated and meted out with a punishment by the present political party in power and puts a slur on the petitioner and therefore, violative of Article 311 of the Constitution of India, and should be set aside. Mr. Sen also cited the Supreme Court decision in (8) *M/s. Laxman & Company v. Dr. Anand R Deshpandey & Anr.*, AIR 1973 SC 171 in support of his proposition that the Court can take notice of subsequent event to shorten litigation to preserve rights of both the parties and to subserve the ends of justice. Mr. Sen rightly submitted that subsequent conduct of the Respondent Nos. 1, 2, and 3 in not paying the salary of the petitioner as Head Assistant inspite of the Court's order and inspite of the fact of his serving as a Head Assistant for the month of August, 1977, and also making appointments in the post of Head Assistant by the order dated the 28th of December, 1977, inspite of Court's order and the promotion of the Respondent No. 5, Nripendra Narayan Chakrabarty, to the Post of Section Officer with retrospective effect makes it quite clear that the said order of reversion of the petitioner was mala fide, highly discriminatory and had the penal consequences of withholding salary and therefore, violative of Article 311(2) of the Constitution of India and should be struck down.

18. Mr Niranarayan Gooptu, appearing for the Respondent Nos. 1, 2 and 3, mainly contended that the petitioner as officiating Head Assistant had no legal right to the said post and he has been reverted as a natural consequences of the said Nripendra Narayan Chakrabarty whose suspension

order was withdrawn and under the W. B. Service Rules he became entitled to join the post which he was holding at the date of the order of suspension. The petitioner being the Juniormost officiating Head Assistant was bound to be reverted to his substantive post and therefore, the said order of reversion cannot be a penalty, discriminatory or malafide as alleged by the petitioner. Mr. Gooptu cited several Supreme Court decisions where it has been held that unless there is a legal right to be in a particular post a Govt. Officer cannot challenge the order of reversion from officiating post to his substantive post. Mr. Gooptu cited the series of decisions in which the principles laid down in the root case of (9) *Purusattam Lal Dhingra v. Union of India*, AIR 1958 SC 36 was applied and followed. Those decisions are in (10) *Madhab Laxman Bhat Kunthi v. State of Mysore* AIR 1962 SC 8, (11) *State of Rajasthan v. Ramswaran* AIR 1964 SC 1361 (12) *The Division Personnel Officer, SER Mysore v. S. Raghadendrachari*, AIR 1966 SC 1259. Mr. Gooptu also submitted that the petitioner has not pointed out any violation of the Service Rules or the Statute by the said order of reversion which was on administrative ground un-connected with his conduct. Mr. Gooptu submitted that as the order of suspension against the said Nripendra Narayan Chakrabarty was withdrawn it was a matter of administrative routine, the petitioner being the juniormost officiating Head Assistant should be reverted to his substantive post to make room for the said Nripendra Narayan Chakrabarty who rejoined his post. Mr. Gooptu referred to the West Bengal Service (Classification, Control and Appeal), Rule, 1971, Rule 8, Explanations (iv) and (v) in support of his proposition that the said order of reversion of the petitioner in the facts and circumstances of this case cannot amount to a penalty within the meaning of the said Rule. Therefore, it cannot be said that the said order was violative of Article 311 of the Constitution of India as it was not a penalty. Mr. Gooptu also referred to the provisions for appeal in Part (v) Rules 15 and 16 of the said West Bengal Service (Classification, Control and Appeal) Rules, 1971, and submitted that if the petitioner was aggrieved by the said order of reversion, he could have preferred an appeal under the said Rules to the appellate authority for remedy and, therefore, the present writ petition cannot lie. Mr. Gooptu submitted that the Rule should be discharged and the interim order should be vacated.

19. Mr. Somenath Chatterjee, appearing for the Respondent No. 6, Biswajit Das, submitted after drawing my attention to the petitioner's letter dated the 9th of August, 1977, that the petitioner did not challenge the order of reversion but has merely prayed for leave to officiate in the leave vacancy in the post of Head Assistant. Therefore, Mr. Chatterjee submitted that the petitioner should not be allowed to challenge the said order of reversion which he accepted as legal and valid. In my view, Mr. Chatterjee was not quite right in his said submission as the said letter if it is read as a whole makes it quite clear that the petitioner's

representation to his appointing authority was that there being leave vacancy he should be allowed to fill in the same according to the age old practice and the said order of reversion is contrary to such practice. The said letter is written in an usual polite form as it should be from a subordinate to the higher appointing authority, Mr. Chatterjee referred to the Supreme Court decision in (13) *G. S. Gill & Ors. v. State of Punjab & Ors.* AIR 1974 SC 1898 where writ petition for quashing an order of reversion from an officiating post to the substantive post was held to be a simple order of reversion not amounting to dismissal or removal within the meaning of Article 311 of the Constitution of India. It was also held that a person acquires a right to the post only when he is specifically appointed to it. There is no stigma that order of reversion cast upon the petitioner. Therefore, it was held that Article 311 of the Constitution of India has no application until the order of reversion casts stigma and was, therefore, punitive in character. In that decision the principles of *Purusattam Lal Dhingra's* case were applied and approved. Mr. Chatterjee also cited a Supreme Court decision in (14) *Gurudev Singh v. State of Punjab* 1971(3) SCC 324 where a suit filed by a Govt. Servant challenging the order of reversion to his substantive post which was dismissed by the Trial Court and the High Court in appeal and thereafter, the Supreme Court in the appeal held that it is quite clear that the appellant was not reverted because of any shortcoming and there was no stigma on him and no adverse remark against his character or efficiency and it was held that he was reverted for administrative reasons and, therefore, he could not complain except on the ground of his legal right to continue in the post which gave him the right to hold the post. Relying on those two decisions Mr. Chatterjee submitted that the said order of reversion is legal and valid and did not amount to punishment and as such, cannot be violative of Article 311 of the Constitution of India.

20. Regarding the maintainability of the present writ petition in view of the provisions of appeal from the impugned order that is existence of alternative remedy Mr. Sen rightly submitted that when a totally unauthorised act which is without jurisdiction is challenged, the bar under article 226(3) of the Constitution of India would not apply and he cited a decision in *Sukumar Banerjee v. Chairman, Calcutta Improvement Trust & Ors* 82 CWN 923. He also cited a decision in (15) *R. Rajiah v. Inspector of Municipal Council & Local Boards, Madras* AIR 1955 Madras 584 where it was held that provisions for the alternative remedy by way of appeal or right of representation to the Govt. under the statute is really illusory when the Govt. itself has decided to pass the impugned order and to seek remedy at the hand of the Govt. is meaningless. Mr. Sen also cited a decision in (16) *Bhartia Electricity Steel Company Limited v. Commercial Tax Officer & Ors.* AIR 1956

Calcutta 299 where it was held that an order passed by an Officer under the directive made by the Govt. and consequently any revision before the Commissioner of Commercial Tax Officer would be meaning less and a mere ritual. Therefore, the writ application must be heard on its merit and was held to be maintainable. In my view, Mr. Sen was right in the facts of this case as when the Govt. in view of its present policy regarding withdrawal of suspension orders, promotion, creation of supernumerary posts etc. it will be absolutely futile and illusory to prefer an appeal under the provisions of the West Bengal Service (Classification, Control and Appeal) Rules, 1971. Therefore, in my view [the present writ petition seems to be the only possible remedy open to the petitioner to get any relief on proper grounds.]

21. Considering the matter very carefully and giving my anxious thought over the matter it appears to be an admitted fact that the petitioner against whom there is no adverse report in fact, inspite of my asking the Respondents to produce the petitioner's Confidential Character Roll, the same was not produced and, therefore, it may be inferred that had it been produced, nothing against the petitioner could be found. It also transpires that the petitioner in the usual course of his employment as a Govt. Servant in the Finance Dept. was promoted from the Lower Division Assistant in the Finance Dept. which he joined on the 12th of August 1959. It further appears that in the usual course he was officiating as a Head Assistant in the Finance Dept. by an office order dated the 22nd of December, 1976, in place of one Panchu Gopal Mitra who was promoted to the post of Section Officer. It is an admitted position that the petitioner received his pay as Head Assistant up to 31st of July, 1977. It is only the salary for the month of August, 1977, was withheld and thereafter the impugned order dated the 1st of September, 1977, was passed reverting the petitioner to his substantive post of Upper Division Assistant. The said impugned order which has been set out before clearly indicates that due to the withdrawal of order of suspension of the Respondent No. 5, Nripendra Narayan Chakrobarty and his resumption of duties on the 28th of July, 1977. The petitioner being the juniormost officiating Head Assistant was reverted to the post of Upper Division Assistant in the afternoon of 27th of July, 1977. It is now an admitted position that on that date there was a leave vacancy in the post of Head Assistant for more than two months and, therefore, according to the General Rule the petitioner should have been appointed in the said leave vacancy as would appear from the note (1) of Rule 55 of the West Bengal Service Rules, Part I. In fact, the petitioner was recommended to be appointed in the said leave vacancy and that was his representation to the appointing authority as per his letter dated the 9th of August, 1977. It further appears that the State Govt. has created supernumerary post to avoid reversion of employees like the Respondent

No. 6 but the petitioner being similarly situated in the post of Head Assistant was not given a berth there by creating a supernumerary post. Therefore, in my view, it appears to be a clear case of discrimination. It is hit by both the Articles 14 and 16 of the Constitution of India. It also appears that [after the change of the Govt. in 1977 various Service Rules made by the previous Govt. have been altered, set aside or cancelled but whatever may be the policy of the political party in power, the security of the Govt. servants and the tenure of their respective services should be maintained so as to ensure efficient, faithful and smooth running of the Govt. machinery by Govt. Servants.] It is now well settled that [all orders of reversion in its immediate effect bound always to be a reduction in rank. Even a reversion from a higher but temporary and officiating rank to a lower substantive rank is in a sense reduction.] See *State of U. P. & Ors. v. Sughar Singh* AIR 1974 SC 423 but it is also well settled that reversion as such is not always "reduction of rank".

"The real test as laid down by the Supreme Court in the said decision is to ascertain if the Officer concern has right to the post from which he is reverted. If he has a right to the post, then reversion is a punishment and cannot be ordered except in compliance with the provisions of Article 311 of the Constitution of India. If on the other hand the Officer concern has no right to the post, he can be reverted without attracting the provisions of Article 311 of the Constitution of India. But even in this case he cannot be reverted in a manner which will show conclusively that the intention was to punish him. The order itself may expressly state that the Officer concern is being reverted by way of punishment. In fact, the order may, in various other ways cast a stigma on the officer concern. In all these cases the order is to be taken as a punishment. Sometime, again, the order of reversion may bring upon the Officer certain penal consequences like forfeiture of pay and allowances or loss of seniority in the sub-ordinate rank or a stoppage or postponment of future chances of promotion. In such cases all the Govt. Servants must be regarded as have not been punished and his reversion to the substantive post must be treated as a reduction in rank. In such cases Article 311 of the Constitution of India will be attracted. In considering the question whether all order of reversion from an officiating post to the substantive post is by way of punishment the Court is only concerned with the question if the order entails any penal consequences. The motive behind the reversion is not relevant."

22. Therefore, it is to be seen whether in the present case any penal consequences had been suffered by the petitioner in the facts and circumstances of this case.

23. It is further laid down by the Supreme Court in the decision of

The State of Bihar & Ors. v. Shiva Bikkhu Misra, AIR 1971 SC 1011 that "for the applicability of Article 311 of the Constitution of India it is not necessary that there should be express words of stigma attributable to the conduct of a Government Servants in the impugned order. There is no rigid principle that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Govt. Officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred to look into at the attendant circumstances to discover whether the order had been made by way of punishment. The form of order is not a conclusive of its true nature and it might merely be a cloak or the Camouflage of an order founded on misconduct. It may be that an order which is innocuous and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine but the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order."

24. The said principle is also reiterated in the subsequent Supreme Court decision in (17) *R.S. Sial v. The State of U.P. & Ors.*, AIR 1974 SC 1317. Therefore, from the facts of this present case it must be examined with care and caution to find out the mode and manner of the petitioner's reversion by the impugned order in the light of the preceding and attendant circumstances and also the subsequent conduct of the Respondent in making appointments both officiating and permanent and also creation of supernumerary post in the Finance Dept. in different cadre in which the petitioner was working, The root case on the subject seems to be on the Supreme Court decision in *Purusattam Lal Dhingra v. Union of India*, AIR 1958 SC 36 where it has been laid down.

"The real test for determining whether the reduction in such cases is or is not by way of arrangement is to find out if the order for the reduction also visits the servant with penal consequences. Thus if the order entails or provides for the forfeiture of the pay or allowances or the loss of his seniority in his substantive rank or the stoppages or the postponement of its future chances of promotion, then the circumstances may indicate that although any form of Govt. had purported to exercise its right to terminate the employment or to reduce the services to a lower rank under the terms of the contract of employment or under the Rules in truth and reliability the Govt. had terminated the employment as and by way of employment. The use of the expression "terminate" or "discharge" is not conclusive. In spite of such used innocuous expression the Court has to apply the two tests mentioned above namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore

referred to. If the case satisfied either of the two tests, it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from the service or the reversion to its substantive rank must be regarded as a reduction in rank and if the requirements of the Rule and Article 311 of the Constitution of India which give protection to Govt. servant have not been complied with, the termination of the service or the reduction in rank must be held to wrongful and in violation of the Constitutional right of the servant."

25. The said test is to be applied to each case and in the light of the peculiar facts, in the background in which the impugned order is made and also the subsequent conduct of the Govt. in relation to such employees would be very material to judge the situation correctly and the purpose, object and consequences of an impugned order. As in this case the petitioner who was officiating as a Head Assistant admittedly had no legal right in the said post but certainly he has a right to be appointed in the leave vacancy according to the General Practice unless there is very good reasons for not doing so. In this case there is no allegation against the petitioner as to any misconduct, inefficiency or indiscipline. On the other hand, the departmental head has recommended the petitioner to be appointed to the said leave vacancy which was existing at the date of impugned order in the post of Head Assistant. It further appears that the Respondent could have created a supernumerary post as they have done in the case of the Respondent No. 6 to avoid reversion of the petitioner who was officiating in the post of Head Assistant. But that was not done and, therefore, it is a discrimination in the facts and circumstances of the present case which is hit by Articles 14 and 16 of the Constitution of India. (See *The State of Mysore v. P. R. Kulkarni & Ors.*, AIR 1972 SC 2170.) The subsequent conduct of the Respondent in not paying the petitioner's salary except by an order of the Court and also making appointments in the post of Head Assistant inspite of specific interim order of the Court not to make any appointment pending the disposal of this application makes it quite clear that the said order of reversion of the petitioner is malafide, discriminatory and against the General Rule of appointment in leave vacancy which was admittedly existing at the date of impugned order. Further, it appears that the said Nripendra Narayan Chakrabarty whose suspension order was withdrawn and who resumed his duties by displacing the petitioner has been promoted as Section Officer with effect from 1st of June, 1974, by the order dated the 28th of December, 1977, set out hereinbefore. Therefore, it is quite clear that the whole purpose of the impugned order of reversion dated the 1st of September, 1977, was simply to push back the petitioner to his original post without considering his case for being appointed in

the existing leave vacancy and also not retaining him by creating the supernumerary post. Therefore, the said order of reversion must be held to be visited with penal consequences as the petitioner having lost the chance of being appointed in the leave vacancy and also in a supernumerary post as in the case of other in similar circumstances like the Respondent No. 6 and also the order dated the 28th of December, 1977, by which one Bhabotosh Roy who was appointed to officiate in the post of Head Assistant. Therefore, the said order is clearly discriminatory and violative of Articles 14 and 16 of the Constitution of India. It is quite clear that in the facts of this case the order of reversion of the petitioner must be said to be visited with penal consequences although the wordings seem to be innocuous and as a matter of routine due to withdrawal of the suspension order of the Respondent No. 5. This case is a class by itself and the penal consequences which has visited the petitioner is very subtle but at the same time quite effective. It is the effect of order alone that matters as the "protection of Article 311 of the Constitution of India is not against the "harsh words" but against the "hard blows". Here the petitioner being treated discriminately not being retained in the officiating post by creating a supernumerary post or being appointed in the leave vacancy as a General Rule under the provisions of Rule 55 Note (1) of the West Bengal Service Rules Part I. Therefore, I have no hesitation in holding that the said impugned order of reversion of the petitioner has visited him with penal consequences and violative of Articles 14 and 16 of the Constitution of India and must be set aside.

26. In the result, the Rule is made absolute. There will be an order of injunction in terms of prayer (f). Further, the petitioner would be paid the salary as a Head Assistant.

27. The Respondent Nos. 1 to 4 to pay the costs of this application.

28. Respondent Nos. 1 to 4 to act on a signed copy of the minutes on the petitioner's advocates on record's undertaking to complete and file this order.

A.S.G.

[CRIMINAL APPELLATE JURISDICTION]

Before Mr. Justice Rabindranath Bhattacharya and Mr. Justice
Monoj Kumar Mukherjee

Decision : June 29, 1978

Satya Kinkar Mallick		Accused/Appellant
	<i>Versus</i>	
The State of W. B.		Respondent*
	And	
Netai Hari Ray		Accused/Appellant
	<i>Versus</i>	
The State of W. B.		Respondent*
	And	
Nilkanta Chatterjee		Accused/Appellant
	<i>Versus</i>	
The State of W. B.		Respondent*

Indian Evidence Act (1 of 1872), Secs. 8, 10, 14, 45, 47, 67 and 73—Admissibility of evidence relating to a period beyond that mentioned in a charge of conspiracy—Secs. 8, 10 & 14—What sec. 67 provides?—Mode of proof of document—Admissibility of documents—Contents—Proof of circumstantial evidence—Nature of circumstantial evidence.

Admissibility of documents and evidence :

It has been contended on behalf of the appellants that charges framed in this case against all the accused persons relate to the period from March 1959 to February 1963 and as such the learned Trial Judge erred in law in entertaining and relying upon the evidence relating to a period beyond that mentioned in the charge.

HELD : It is true, as a general proposition, that the evidence of commission or omission constituting the offence is to be confined to the period mentioned in the charge, but for the purpose of the charge of conspiracy, however, there can not be such a blanket ban as there are certain provisions of the Evidence Act, other than section 10 with the aid of which evidence outside the period mentioned in the charge can be admitted and relied upon. Moreover in a charge of conspiracy, the conduct in general of each individual co-conspirator including his acts, writings and statements is evidence against himself such conduct irrespective of time to which it relates, can be relied on by the prosecution to show the criminality of the intention of the individual accused with reference to his proved participation in the alleged conspiracy such evidence would come under sections 8 and 14 of the Evidence Act and would be admissible.

Section 67 of the Evidence Act does not lay down any specific mode of proof and it only provides that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature, the hand

*Criminal Appeals 314, 350 and 351 of 1969.

writing of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Or in other words section 67 only enjoins that before a document can be looked into, it has to be proved but does not provide for the mode of proof. Section 47 of the Evidence Act, which comes under the part relating to relevancy of facts, provides that the opinion of persons who are acquainted with the handwriting of a particular person are relevant facts and the person who can be said to be acquainted with the handwriting is described therein similarly, opinion of a handwriting expert for identifying a handwriting is also a relevant fact. It would thus appear, that the Evidence Act has not laid down any specific manner of proving a handwriting but have only laid down that evidence of certain persons are relevant for proving document.

Proof of documents by their contents have been acknowledged by our courts as a proof by circumstantial evidence.

Though the ordinary methods of proving a document are by calling as a witness the person, who had executed the document or saw it executed or signed or is qualified to express an opinion as to the handwriting there can be other modes of proof of such documents, some of the other modes are, by comparison of the handwriting as envisaged under section 73 of the Evidence Act, by evidence of a handwriting expert under section 45 of the Evidence Act, by admission of the person against whom the document is tendered and by circumstantial evidence, the principle which inevitably has to be followed for reception and acceptance of such evidence has to be borne in mind and that is, the circumstantial evidence must be of sufficient strength to carry conviction. In other words, circumstantial evidence as a mode of proof of authorship or execution of documents is a legitimate method of proving a document and such evidence may consist of the internal evidence of the contents in the document and other surrounding circumstances.

Cases referred to :—

- (1) *Sardul Singh Caveeshar v. The State of Bombay*, AIR 1957 SC 747
 - (2) *Barendra Kumar Ghosh v. Emperor*, ILR 37 Cal. 467-424
 - (3) *Karali Prosad Dutta and another v. East India Railway Co.*, AIR 1928 Cal. 498
 - (4) *Mobarik Ali Ahamed v. State of Bombay*, AIR 1957 SC 857
- S. D. Banerjee, Balai Chandra Ray and Sobhanlal Hazra*
 ... for Appellants in Cr. Appl. no. 350 and 351 of 1969
N. C. Banerjee and Arun Kumar Mookherjee...for Appellant in Cr. Appl. no.
 ... 314 of 1969
S. M. Sanyal ... for the State

The judgment of the Court was as follows :—

Mukherjee, J : All these three appeals, arising out of the judgment dated 24.5.69 rendered by the learned Judge, Special Court, Burdwan in

Special Court Case No. 3 of 1963, have been heard together and are being disposed of by this common judgment.

2. At all material times Netai Hari Roy, the appellant in Criminal Appeal No. 350/69 was the contractor of Bijoy Chand Hospital, commonly known as B. C. Hospital, Burdwan for supplying dietary and other articles. Nilkanta Chatterjee, the appellant in Criminal Appeal No. 351 of 1969 was one of his employees looking after the said contract job. Of the various articles that were to be supplied to the Hospital, some were tendered articles and some were non-tendered. For payment of the price of non-tendered articles to the contractor Netai Hari, the Hospital authorities used to obtain the prevailing market rates of those articles from the Sub-divisional Agricultural Marketing Officer, Burdwan (hereinafter referred to as the Marketing Officer) through correspondences. On receiving communication about the market rates from the Marketing Officer the Hospital authorities used to pass the bills of the contractor in accordance with the rates furnished by the Marketing Officer.

3. The prosecution case is that during the period from March, 1959 to February, 1960 the accused Netai Hari and his employee Nilkanta entered into a criminal conspiracy with Satya Mullick, an employee of the Burdwan Collectorate and the appellant in Criminal Appeal No. 314 of 1969, one Hareprosad Chatterjee, another employee of the said Collectorate and Makhan Chowdhury, head clerk of the Office of the District Medical Officer, Burdwan and collected letters and correspondences addressed to the Marketing Officer by the B. C. Hospital and replied to those letters themselves under the signature of either Satya or Haraprasad designating themselves as the Marketing Officer and through those letters inflated rates in respect of ice were supplied to the B. C. Hospital on the basis of which inflated bills were prepared and passed for payments and subsequently encashed by the contractor. Sri Dwijendra Chandra Chakraborty (P. W. 30), an Inspector of Police attached to the District Enforcement Branch Burdwan got an information and in pursuance of that information he searched the house of the accused Netai Hari at Ranigunge Bazar, Burdwan on 17.7.60 after obtaining the requisite search warrant from the Magistrate. A number of documents including a draft of a letter in the hand writing of the accused Netai Hari purportedly addressed by the Marketing Officer to the Resident Medical Officer, B. C. Hospital, a typed letter dated 3.3.60 regarding quotation of ice addressed to the Resident Medical Officer, B.C. Hospital by the Marketing Officer and a typed writer machine were seized therefrom. On the self same day Sub-Inspector S.N. Chatterjee searched the house of one Satya Prasad Burman and seized some documents. After the above two searches and seizures Sri Chakraborty lodged a complaint with the Burdwan Police Station and on the basis thereof. Burdwan Police Station Case No. 39 dated 17.7.60 was started against Netai Hari, Nilkanta, Satya Prasad and others under

Sections 420/409/468/471/120B of the Indian Penal Code. Sri Chakraborty took up investigation of the case and seized various documents from the Office of the Marketing Officer and the B.C. Hospital. He also searched the house of Satya Mullick on 28.7.60 and seized various documents including typed letters bearing the signatures of Satya Mullick or Haraprosad Chatterjee describing themselves as the Marketing Officer and addressed to the Resident Medical Officer, B.C. Hospital. In course of investigation he arrested some other persons including Biswanath Roy, Dharani Dhar Malakar and Haraprosad Chatterjee. He took the specimen writing of Makhan and Dharani Dhar before the Magistrate. He could not, however, take the specimen hand writing of Netai, Nilkanta or Satya as they refused to give the same. The Investigating Officer, then seized some petitions for casual leave made by Satya and Haraprosad together with other documents bearing their signatures from the Burdwan Collectorate on 20.8.60. He sent some of the documents seized during investigation including the typed letters bearing the signatures of Satya Mullick and Haraprosad and the issue register maintained at the B.C. Hospital to the hand writing expert. After examination of witnesses and obtaining necessary sanction for prosecution against some of the persons arrested in connection with the case, the Investigating Officer submitted chargesheet against eight accused persons including the three appellants. He thereafter, made a prayer for allotment of the case and on receipt of the order of allotment, the learned Judge, Special Court, Burdwan took cognizance of the case and issued process against the eight accused persons. After thirty four witnesses were examined by the prosecution and a number of documents were exhibited at its instance, the learned Judge by an order dated November 10, 1965 framed charges against five of the accused persons while discharging the three others, namely, Biswanath Roy, Satya Barman and Dharani Dhar Malakar as there was no *prima facie* case against them. A common charge under Section 120B/420 of the Indian Penal Code was framed against all the five accused persons, namely, Netai Hari Roy, Nilkanta Chatterjee, Makhanlal Chowdhury, Haraprosad Chatterjee and Satya Kinkar Mullick. Charges under Sections 474 and 420 of the Indian Penal Code were framed against accused Netai Hari Roy. A common charge under Section 471 of the Indian Penal Code was framed against Netai Hari Roy and Nilkanta. Separate charges under Sections 419, 476 and 468 of the Indian Penal Code and under Section 5 of the Prevention of Corruption Act, 1947 were framed against accused Satya Kinkar Mullick. Separate charges under Section 476 of the Indian Penal Code and under Section 5 of the Prevention of Corruption Act, 1947 were framed against Haraprosad Chatterjee. A charge under the above Section of the Prevention of Corruption Act was also framed against accused Makhan. During the pendency of the trial accused Haraprosad Chatterjee died and as such the case proceeded against the three appellants and Makhan.

4. The defence of the accused persons as it appears from the trend of the cross-examination and statement made during their examination under Section 342 of the Code of Criminal Procedure, was that they were innocent and were not parties to any conspiracy. The accused Satya Mullick, further, stated that the documents allegedly seized from his house were planted for which he was obliged to file an application before the learned Magistrate.

5. The learned Judge, on a consideration of the materials on record, found the accused Makhan Chowdhury not guilty of all the charges levelled against him and accordingly acquitted him. The learned Judge however, found all the three appellants guilty of the charge under Section 120B/420 of the Indian Penal Code and convicted and sentenced each of them to suffer rigorous imprisonment for three months and to pay a fine of Rs. 500/- in default to suffer rigorous imprisonment for three months more. He found the accused Netai Hari and Nilkanta also guilty of the charge under Section 471 of the Indian Penal Code and sentenced both of them to suffer rigorous imprisonment for three months each and to pay a fine of Rs. 300/- each. The accused Netai Hari was also found guilty of the charge under Section 420 of the Indian Penal Code but no separate sentence was passed. Accused Satya Kinkar was found guilty of the charge under Section 419 of the Indian Penal Code and was sentenced to suffer three months' rigorous imprisonment and to pay a fine of Rs. 200/- in default to suffer rigorous imprisonment for three months more. Accused Satya was also convicted under Section 468 of the Indian Penal Code and sentenced to suffer three months' rigorous imprisonment and to pay a fine of Rs. 300/- in default three months' rigorous imprisonment more. He, further, directed that the substantive sentences passed against each of the three accused should run concurrently. Netai Hari was, however, acquitted of the offence under Section 474 of the Indian Penal Code and Satya Hari of the offences under Section 476 of the Indian Penal Code and under Section 5 of the Prevention of Corruption Act, 1947.

6. We have heard Mr. Shankar Das Banerjee, the learned Advocate appearing with Mr. Balai Chandra Ray and Mr. Sobhanlal Hazra, on behalf of the appellants Netai Hari Roy and Nilkanta Chatterjee and Mr. N. C. Banerjee appearing with Mr. Arun Kumar Mukherjee on behalf of the appellant Satyakinkar Mullick. We have also heard Mr. Surati Mohan Sanyal, the learned Advocate appearing for the respondent, State of West Bengal in all the three appeals. We have also gone through the oral and documentary evidence adduced in the case and the judgment under challenge.

7. Before we proceed to consider the merits of the appeals we proposed to dispose of a point of law raised at the outset on behalf of the appellants regarding admissibility of certain documents. It has been

contended on behalf of the appellants that the charges framed in this case against all the accused persons relate to the period from March 1959 to February 1960 and as such the learned Trial Judge erred in law in entertaining and relying on evidence relating to period beyond that mentioned in the charge. On a perusal of the record we find that the learned Judge has, in fact, referred to and relied upon some oral and documentary evidence relating to period beyond that mentioned in the charges. The question, therefore, that falls for determination is whether, evidence, adduced in respect of a period other than that mentioned in the charge could have been admitted or relied upon for the purpose of ascertaining whether the charges framed have been proved or not. It is true, as a general proposition, that the evidence of commissions or omissions constituting the offence is to be confined to the period mentioned in the charge, but for the purpose of the charge of conspiracy, however, there cannot be such a blanket ban as there are certain provisions of the Evidence Act, other than Sec. 10 with the aid of which evidence outside the period mentioned in the charge can be admitted and relied upon. In the instant case the charge of conspiracy against the accused persons is that, between the period from March 1959 to February 1960 at Burdwan the accused persons agreed with one another to do or caused to be done illegal acts, namely, to cheat the B. C. Hospital, Burdwan and some of its officers by dishonestly inducing them to recommend payments to pass and deliver an excess amount of money against inflated bills drawn by Netaihari Roy as also by causing to commit and/or committing forging of market rates submitted with those bills, which were done in pursuance of the said agreement. To prove the above charges all evidence which go to show that the bills submitted for that period were inflated and that the market rates submitted therewith were forged is certainly admissible, notwithstanding that such evidence may necessarily refer to and narrate acts of the conspirators beyond the period of conspiracy but should be within a reasonable limit and not too remote. Then again, in a charge of conspiracy, the conduct in general of each individual co-conspirator including his acts, writings and statements is evidence against himself. Such conduct, irrespective of the time to which it relates, can be relied on by the prosecution to show the criminality of the intention of the individual accused with reference to his proved participation in the alleged conspiracy. Such evidence would come u/s. 8 and 14 of the Evidence Act and would be admissible. This view was expressed by the Supreme Court in this case of (1) *Sardul Singh Caveeshar v. The State of Bombay* reported in in AIR 1957 Supreme Court 747 and we propose to consider the evidence keeping in view the above principle.

8. That the appellant Nitaihari Roy was a contractor of the B. C. Hospital and the appellant Nilkanta was one of his employees is not in dispute. P. W. 2 Bhupendra Chandra Nag, who was an employee of the

Hospital at the material time, stated that he knows accused Netaihari who was diet contractor of the hospital and in connection with supply and bill matters his employee Nilkanta use to come to hospital. P. W. 10 Dr. D. Banerjee, who was the District Medical Officer stated that ice and other articles for the hospital used to be purchased from contractor and Netaihari Roy was one such contractor. P. W. 29 Nripendra Nath Bhattacharya, who was accounts clerk in the B. C. Hospital in 1959, stated in his evidence that Netaihari Roy was a contractor of the hospital for diet supply. This aspect of the prosecution case has not been challenged in cross-examination and it has been conclusively proved that Netaihari Roy was the diet contractor of the hospital and Nilkanta was his employee. Similarly, the uncontroverted evidence of P. W. 5 Gauri Prasad Aich, who was the Nazir of the Burdwan Collectorate at the material time, proves that appellant Satyakinkar Mullick and accused Haro Prasad Chatterjee (since deceased) were employees of the Burdwan Collectorate.

9. According to the case of the prosecution certain articles supplied by the contractor to the hospital were tendered articles while others were non-tendered and ice was one of such non-tendered article. For such non-tendered articles the hospital authorities used to ascertain market rates from the Sub-divisional Agricultural Marketing Officer who is also known as Sub-divisional Marketing Officer through correspondences. P. W. 16, Dr. R. C. Roy, who was the Resident Medical Officer of B. C. Hospital from August, 1959 stated that he used to ask for rates for ice and other articles from the Sub-divisional Marketing Officer, Burdwan and he proved some of the letters written by him in this regard. According to his evidence the bills of contractor used to be accompanied by market rate-sheets and he used to sign the bills and copies of those sheets after they were placed before him by either the accounts clerk or the head clerk. P. W. 10, Dr. Banerjee while being cross-examined stated that genuine certificate of Marketing Officer is necessary in those cases where there has been no proper tender. P. W. 13 Nirode Baran Singha, Inspector of Accounts, who was attached to the office of the Chief Medical Officer, Burdwan from September 1958 to December 1963 during cross-examination stated that in cases where no open tender is issued for purchase of articles, quotations are obtained from Agricultural Marketing Officer or Circle Officer. The above evidence of the witnesses attached to the hospital also find corroboration from the witnesses of the office of Sub-divisional Agricultural Marketing Officer. P. W. 4 Surajit Ranjan Biswas, who was the Sub-divisional Agricultural Marketing Officer stated that market rates were furnished by his office to B. C. Hospital, Burdwan and his office also intimated rates of ice to the hospital. P. W. 6, Arun Kumar Chakravarti, a clerk in the office of the Marketing Officer stated that from

their office market rates of commodities used to be furnished to different departments of Government and firms. Along with the oral evidence of the above witnesses we find from the issue register of the hospital that during the relevant period letters were issued to the Sub divisional Marketing Officer asking for market rates of different commodities including ice and such rates were asked for each month. Some of those relevant entries in the issue register are exhibits 3/1, 3/2, 3/3 and 3/4.

10. From the above discussion of evidence, we are fully satisfied that the appellant Netaihari Roy was a diet contractor of B. C. Hospital and he used to supply different commodities including ice which was a non-tendered commodity. The rate, according to which, the contractor was to be paid for such supply of ice was the rate furnished by the Marketing Officer, Burdwan and for that purpose the hospital authorities used to write letters to the Marketing Officer who in his turn, used to furnish the rates through written replies. The bills of the contractor were to be accompanied by the market-rate-sheets supplied by the Marketing Officer at the time of presentation before the Resident Medical Officer for being passed for payment.

11. Mr. Balai Chandra Ray, the learned advocate appearing for the contractor submitted that there is no evidence on record that the contractor had to submit market rates along with his bills nor there is any evidence to show that bills were to be passed and payments were to be made only according to the market rates to be furnished by the Marketing Officer. We are, however, unable to accept the contention of Mr. Ray. The evidence of P. W. 33, Dr. U. N. Saha, who was the Chief Medical Officer is that along with the bills submitted by Netaihari Ray there were market rates attached by him were necessary. The necessity of such submission of market rates were in respect of non-tendered articles supplied by the contractor. The evidence of P.W. 1, Monindra Nath Bhattacharya, a clerk attached to the hospital is that the quotations were to be produced along with the bills. The evidence of P.W. 10 that he noted irregularities such as there was no invitation of tender issued by any committee and the rates of the articles, particularly of ice were not certified by the Agricultural Marketing Officer clearly indicate that without such market rates no bills were allowed to be submitted by the contractor for supply of non-tendered articles. The evidence of P.W. 12 Shibapada Mondal and P.W. 13 Nirode Baran Singha who were attached to the office of the Chief Medical Officer clearly indicate that for encashment of bills, copies of market rate used to be sent along with the contractor's bills and in cases where no open tender was issued for purchase of articles, quotations were obtained from Agricultural Marketing Officer, or Circle Officer. The positive evidence of Amulya Prosad Roy (P.W. 14) is that along with the bills of ice,

etc., supplied there is a market-sheet attached and after this is submitted by a contractor the office prepares the proforma and then it comes to his office and he places the same before the District Medical Officer. After he signs the bills they are sent to Chief Medical Officer for counter signature. The accused Netaihari also in his cross-examination u/s. 342 of the Code of Criminal Procedure stated that at times slips of bazar rates were enclosed with the bills. All these evidence and materials on records clearly prove that the bills for non-tendered articles were to be accompanied by market rates supplied by the Marketing Officer and the contractor was fully aware of the same. There is also no dispute that at the material time ice was a non-tendered article.

12. The next part of the prosecution case is that the letters addressed and meant for Marketing Officer, Burdwan were entered in the issue register of the hospital for onward transmission to the Marketing Officer were collected by the contractor Netaihari or his representative. These letters were taken delivery of by the contractor or his representative, though they were to be sent to the addresses either through peon or by post. After taking delivery of these letters, Netaihari in collusion with the appellant Satya Kinkar Mallick and accused H.P. Chatterjee used to create forged documents purportedly signed by the Marketing Officer indicating in the said letters that those are being sent by the Marketing Officer in reply to the letters addressed to the Marketing Officer by the hospital authorities asking for market prices from the Marketing Officer and these forged letters containing market rates were attached to the bills of the contractor Netaihari to obtain inflated price for supply of ice. According to the case of the prosecution, the market rates which were attached to the bills by the contractor in respect of ice were inflated and the hospital authorities were induced to pay the prices shown in the market rate-sheets attached to the bills as these market rate-sheets indicated as if they were being sent by the Marketing Officer to the hospital authorities, though in fact, they were forged and were never issued by the Marketing Officer.

13. In proof of the allegation that Netaihari or his representative Nilkanta used to accept letters addressed to the Marketing Officer the prosecution exhibited a number of issue registers of the hospital and exhibit 4 series are some of the entries in the register wherefrom it appears that such letters were received by Nilkanta. These entries in the issue register clearly indicate that Netaihari, through his representative, used to receive letters addressed to the Marketing Officer by the hospital authorities though under normal circumstances these letters were to be sent by post or through peon book to the office of the Marketing Officer. Evidence has also been led to show that the replies to these letters were sent under the purported signatures of the Marketing Officer, even though those were not sent by the Marketing Officer. The evidence also indicates that the letters were sent under the signatures of the appellant Satya

Mullick or, accused Haro Prasad Chatterjee. Some of these documents have been filed in court and were marked Y series for identification. These letters, according to the case of the prosecution, purport to be the market rates furnished under the signature of the two accused Satya Kinkar Mullick and Haro Prasad Chatterjee and their signatures have been proved by some of the witnesses examined in this case. Before, however, we can look into the contents of those documents we would like to take-up for consideration an important point of law raised by the learned lawyers appearing for the appellant about the admissibility of the same. It has been contended both by Mr. M. C. Banerjee and Mr. Balai Chandra Ray that the signatures appearing thereon have been proved and not their contents and, therefore, the contents of the document cannot be looked into. Mr. Banerjee submitted that under section-67 of the Evidence Act if contents of the documents are to be looked into and relied upon, they are to be proved and such proof can be if any of the three manners provided for in the explanations to Section 47 of the Evidence Act, viz. by a person who has seen that person write or when he has received documents purported to be written by that person in answer to document written by himself or under his authority and addressed to that person, or when, in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him. According to Mr. Banerjee the contents of the documents can not be proved, in any manner other then mentioned in Section 47 of the Evidence Act and in the instant case there being no such evidence in proof of these documents (Y series) the same can not be looked into. Mr. Banerjee asserted that there cannot be any departure from the mode of proof provided for u/s. 47 of the Evidence Act and as such the contents of these documents should be left out of consideration and once they are left out of consideration, there is no evidence on record to hold that any market rates were furnished by the accused or for that matter there was any cheating forgery or conspiracy to cheat the hospital authorities.

14. As we have already indicated the documents (Y series) have been formally proved only to the extent of the signatures appearing thereon which, according to the prosecution witnesses are either in the of S.P. Mullick or H. P. Chatterjee. According to the prosecution case the contents of all these documents indicate the market rates supplied by the accused persons with an inflated price of ice shown and in fact, the entire prosecution case rest upon the contents of these documents. In other words if the contents of these documents can not be looked into for not having been formally exhibited, as contained by Mr. Banerjee, the entire prosecution case must fail. Let us, therefore, now consider whether the contents of the documents can be said to have been proved enabling us to look into the same.

15. Section 67 of the Evidence Act does not lay down any

specific mode of proof and it only provides that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Or in other words Section 67 only enjoins that before a document can be looked into, it has to be proved but does not provide for the mode of proof. Section 47 of the Evidence Act, which comes under the part relating to relevancy of facts, provides that the opinion of persons who are acquainted with the handwriting of a particular person are relevant facts and the person who can be said to be acquainted with the handwriting is described therein. Similarly, opinion of a handwriting expert for identifying a handwriting is also a relevant fact. It would thus appear, that the Evidence Act has not laid down any specific manner of proving a handwriting but have only laid down that evidence of certain persons are relevant in proof of a document.

16. Wigmore in his *Treatise on Evidence* (Third Edition, Vol. 7, Page 606) while discussing different mode of authentication of documents observed :—

“Accordingly, it seems generally conceded that the mere contents of a written communication, purporting to be of a particular persons, are of themselves not sufficient evidence of genuineness. Only in special circumstances, where the contents reveal a knowledge or other trait peculiarly referable to a single person, could the contents alone suffice.

However, where the necessity above-mentioned does in fact exist, namely, the impossibility of obtaining handwriting testimony, it would seem to follow that resort must be had to the evidence from contents, at any rate, in some circumstances or upon the facts of a particular case.”

Proof of documents, by their contents have also been acknowledged by our Courts as a proof by circumstantial evidence. In the case of (2) *Barindra Kumar Ghosh v. Emperor*, reported in the ILR XXXVII Calcutta, page 467 (at page 524), Justice Carduff while considering the question whether certain letters could be attributed to one of the accused said :

“The stereotyped methods of proof thus went by the wall. But I am unable to concede, and I can find no authority for the proposition, that a particular individual's authorship of a document cannot be established by the force of circumstantial evidence.”

and further said :

“And one can readily imagine cases in which circumstantial evidence might be immeasurably superior in most if not all, of the stereotyped media of proof. For example, A, whose credit is unimpeachable, is able to swear that B was the sole occupant of a

room, and that as soon as B left it, he (A) entered and found a letter, with the ink still wet lying on the table. There could be no more convincing and conclusive evidence that B wrote that letter, however, feigned the handwriting might be, however unlike B's ordinary penmanship, however, strong B's denial. I cannot believe that the law would reject such evidence; I can find nothing in the Evidence Act to exclude it; but, on the contrary, it seems to me that it would be admissible under Section 6, or Section 7, or Section 9, or Section 11, and I consider that those provisions may be appealed to here."

17. In the case of (3) *Karali Prosad Dutta and another v. East India Railway Co.*, reported in AIR 1928 Calcutta page 498, a Division Bench of our Court quoted with approval an earlier decision of a Single Judge that Sections 60 and 67 (Evidence Act) were somewhat ambiguous but that it was never intended by Section 67 that direct evidence of handwriting was always necessary, but the section merely stated, with reference to deeds, what was the universal rule in all cases that the person who makes an allegation must prove it and lays down no new rule as to the kind of proof to be given; and that it was never intended by Section 60 to exclude circumstantial evidence of a thing which could be seen, heard and felt though at first sight the section might appear to have that meaning.

18. The Supreme Court in the case of (4) *Mobarik Ali Ahamed v. State of Bombay*, reported in AIR 1957 Supreme Court page 857 while repelling a similar contention as raised in this case by the learned advocates for the appellants, observed :—

"The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in ss. 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged senior, limited though it may be, as also his knowledge of the subject matter of the chain of correspondence, to speak to its authorship. In an appropriate case the court may also be in a position to judge whether the document

constitutes a genuine link in the chain of correspondence and thus to determine its authorship. We are unable, therefore, to say that the approach adopted by the courts below in arriving at the conclusion that the letters are genuine is open to any serious legal objection. The question, if any, can only be as to the adequacy of the material on which the conclusion as to the genuineness of the letters is arrived at. That however is a matter which we cannot permit to be canvased before us.

A few of the letters said to have been received from the appellants as stated above, do not bear his signatures. These were held to have been proved by the circumstantial evidence as pointed out and we see no objection thereto."

19. From the foregoing discussions, therefore, the following propositions emerge.

20. Though the ordinary methods of proving a document are by calling as a witness the person, who executed the document or saw it executed or signed or is qualified to express an opinion as to the handwriting there can be, other modes of proof of such documents. Some of the other modes are by comparison of the handwriting as envisaged U/s. 73 of the Evidence Act, by evidence of a handwriting expert U/s. 45 of the Evidence Act, by admission of the person against whom the document is tendered and by circumstantial evidence. But in arriving at the conclusion about the proof by circumstantial evidence, the principle which inevitably has to be followed for reception and acceptance of such evidence has to be borne in mind and that is, the circumstantial evidence must be of sufficient strength to carry conviction. In other words, circumstantial evidence as a mode of proof of authorship or execution of documents is a legitimate method of proving a document and such evidence may consist of the internal evidence of the contents in the document and other surrounding circumstances.

21. Let us therefore consider whether there is sufficient circumstantial evidence in the instant case to hold that the documents (marked Y series) have been proved satisfactorily. The documents (Y series) which are typewritten and contain some occasional handwritten endorsements purport to be issued from the office of the Sub-divisional Marketing Officer, Burdwan and bear certain memo numbers and dates. They also contain reference of memos and the date thereof in reply to which they are being written. Thereafter the memos proceed on to give the rates of certain articles including ice for a particular month. At the bottom a signature appears and the signatory is described as the Sub-divisional Marketing Officer, Burdwan Collectorate, Burdwan. There is also the stamp and seal purportedly of the Sub-divisional Marketing Officer of Burdwan. Along with the market rates there are some forwarding letters bearing memo numbers and addressed to the Resident Medical Officer, Bejoy Chand Hospital, Burdwan and these memos purported to be

issued in reply to the memos of the Marketing Officer, Burdwan Collectorate. These forwarding memos also, bear the signatures and beneath the said signature, the designation of the signatory is given as Sub-divisional Marketing Officer, Burdwan and a stamp and seal of the said office are also impressed thereupon. All the signatures appearing in those documents (Y series) have been proved to be in the handwriting of either the appellant Satya Kinkar Mullick or the accused Haro Prasad Chatterjee (since deceased). It has been contended by Mr. Banerjee appearing on behalf of the appellant Satya Mullick that the evidence of P.W. 5 Gauri Prasad Aich do not conclusively show that the signatures are those of Satya, as he has stated in cross-examination that the signatures proved by him seem to be the signatures of accused Satya Mullick. We are, however, unable to accept the contention of Mr. Banerjee. This witness (P.W. 5) was at the material time, working in the Burdwan Collectorate as Nazir and he was an employee of the Collectorate since 1934. According to his evidence both Satya Mullick and Haro Prasad Chatterjee were employees in the Collectorate and his evidence is that he knew the signature of Satya Mullick as he came to know this in course of office work. Being an employee of the same office this witness was thoroughly conversant with the signature of Satya Mullick as stated by him and he was a competent person to prove the signatures of his colleague. In his examination in chief he has proved the signature of Satya Mullick appearing in most of the documents (Y series). He has also proved signature of Satya Mullick appearing in certain hand written applications addressed to the Collector of Burdwan by him while working in office. In cross examination of course he has stated that signature proved by him seems to be the signature of accused Satya Mullick and according to Mr. Banerjee, this answer given by Gauri Prasad Aich do not conclusively prove that the signature appearing in the documents earlier proved by him were there of Satya Mullick. To clarify this statement given by P.W. 5 in cross-examination the learned Trial Judge put a question to the witness and in answer thereto he stated that in examination in chief he has stated that the signatures of accused Satya Kinkar are his signatures. On a careful reading of his evidence we are fully satisfied that this witness was a competent witness to prove the signature of Satya Mullick. P.W. 22, another clerk of the Burdwan Collectorate who worked there from April 1930 till January 1963 deposed to the effect that he knew accused Haro Prasad Chatterjee and Satya Kinkar Mullick who worked there and knew their handwriting and signatures and he proved certain signatures. He also proved the signatures of Satya Mullick in some of those documents (Y series). In cross-examination this witness stated that he worked with Satyakinkar in the same department, namely, Revenue Munsif Khana in 1959. He further, stated in cross-examination that the signatures proved by him seem to be the signatures of Satya Mullick and of Haro Prasad, but so

far as exhibits 23/7, 23/8 and 23/11 they were definitely of Haro Prasad. Along with the evidence of these two witnesses there is the evidence of the handwriting expert Sunil Kumar Chakravorti, P. W. 25. He compared the signatures of Satya Mullick appearing in some of the documents (exhibit Y series) with his standard signatures and according to his evidence the signature appearing in some of the documents (Y series) are in the hand-writing of Satya Mullick. His evidence regarding the signature of Haro Prasad Chatterjee are also in the same vein. In cross-examination this witness stated that the opinion was based on comparison with his standard writings. The documents that were forwarded to the handwriting expert as standard writings were certain applications for leave etc. of Satya and Haroprasad filed with the Collectorate. It was now here been challenged by Satya Mullick that these documents, namely his leave application etc., were not written by him and we are satisfied from the evidence on record that the comparison that was drawn by the hand writing expert for examining the questioned document were from the standard writings.

22. The evidence of P. W. 5 and P. W. 22 along with the evidence of the handwriting expert, conclusively prove that the signatures appearing in some of the documents (marked Y series) are either that of Satya Mullick or Haro Prasad Chatterjee. The contents of the documents as we have already indicated related to market rates and were being issued under the signature of Satya Mullick or Haro Prasad Chatterjee in reply to memos issued by the Hospital authorities to the Sub-divisional Agricultural Marketing Officer. The other circumstances suggesting the authorship of the documents are that the originals of these documents (marked Y series) were seized from the office of the Burdwan Hospital as they were annexed to the bills of Netai Hari Roy. Another important circumstance proved in this case is that the memo numbers appearing in some of the documents (Y series) tally with the memo numbers appearing in an exercise Book, which was being used as a peon-book (exhibit 24) seized from the house of accused Satya Mullick. Entries in the exercise book, this note-book has been proved to be in the handwriting of Satya Mullick (vide evidence of P. W. 22). In this note-book entries have been made showing issue of memos addressed to the R. M. O. B. C. Hospital, Burdwan with the date of issue, number, addressee and contents of the memo and these entries tally with the contents of the original memos showing market rates (Y series).

23. It was strenuously argued on behalf of the appellant Satya Mullick that the seizure of the exercise book and other documents from the house of Satya Mullick is a false and concocted story and therefore, no reliance should be placed on the documents purportedly seized from the house of Satya Mullick. In this connection, our attention has been drawn to an order dated 5.8.60 passed by the Subdivisional

Magistrate wherefrom it appears that an application was filed by Satya Mullick on 2.8.60. It has been contended on behalf of Satya Mullick that by this application the accused challenged the seizure allegedly made from his house on 28.7.60. The application filed by Satya Mullick on 2.8.60 has not been exhibited in this case and we are not in a position to ascertain the contents thereof. Assuming that such an application was made by Satya it has to be seen how far the contention of Satya in this regard can be accepted. The search, according to the prosecution, was conducted by Sri Dwijendra Chandra the Investigating Officer of the case (P. W. 30). He stated in his examination in chief that on 28.7.60 he seized some documents from the house of accused Satya Mullick under a seizure list written and signed by him in presence of witnesses and the seizure list has been marked Ext. 25/12. This witness in cross-examination stated that after Satya Kinkar surrendered in court on 26.7.60 he took the accused in police custody for one day and on 27.7.60 he again took the accused in police custody for three days. While the accused was in their custody the house was searched on 28.7.60. This witness denied the suggestion of the accused that the papers seized from the house of accused Satya Kinkar were planted by him and that he took the accused along with the papers to his house. P.W. 21 Mahima Ranjan Sadhu a witness to the said search and seizure stated that he worked in Josari Rice Mill for the last 14/15 years and he knew Satya Mullick who resided in a house near the Mill in 1960. On 28.7.60 he and Ramani Goala of their locality were called by a police officer to witness a search in the house of Satya Mullick. In their presence the accused brought and handed over a bundle of papers to the police officer and the police officer seized those papers making out a list of each document and he signed the same. Besides proving his own signature he proved the signature of the other witness who was present along with him as also that of the accused Satya Mullick. In cross-examination, however, this witness gave a complete go-by to his statement made in examination in chief and stated that he did not visit the house of accused Satya Mullick and that he was called to the place of accused Satya after the search. After the search he was asked to sign a seizure list which he initially refused but and being forced by the police officer, he subsequently signed on the same. The witness was declared hostile and cross-examined by the prosecution. Then he admitted that before the Investigating Officer he stated that Satya brought a bundle of documents and a seizure list was prepared by the Investigating officer in their presence. The fact of seizure has not been challenged by the accused. What is being challenged is, that the documents that were seized from the house of accused Satya were planted by the Investigating Officer. In this connection it has to be borne in mind that some of the documents seized have been proved to be under the signature of accused Satya Mullick. The suggestion of the defence in that context is unacceptable as documents

bearing the signature of the accused could not have been planted unless such documents were created by the police officer after forcibly obtaining the signature of Satya Mullick thereon, which is not his case. That apart, we find no circumstance appearing on record supporting the suggestion of the accused, which has been specifically denied by the Investigating Officer. From the evidence of the Investigating Officer and the contemporaneous seizure list we are satisfied that documents appearing in the seizure list were seized from the house of accused Satya Kinkar Mullick.

24. Apart from the seizure of the exercise-book (Ext. 24) from the house of Satya, there is another circumstance to prove the authorship of the documents (Y series). As we have already indicated some of those documents bear a stamp and seal of the Sub-divisional Marketing Officer and the words "Sub-divisional Marketing Officer" have also been typed under the signature of Satya or Haro Prasad as the case may be. P.W. 4 the Marketing Officer have stated in his evidence that their office has only a seal and rubber stamp showing "Sub-divisional Agricultural Marketing Officer, Burdwan Sadar" and that they have no other description of their office or any other rubber stamp as "Sub-divisional Marketing Officer". According to his evidence there was no clerk named Haro Prasad Chatterjee or Satyakinkar Mullick in his office and there was no Sub-divisional Marketing Officer at Burdwan Sadar either by the name of Haro Prasad Chatterjee or Satya Kinkar Mullick. As we have already discussed he was the Marketing Officer at Burdwan from 1957 to June 1960, that is, during the relevant period. He has also in his deposition specifically denied that the documents marked (Y series) were issued from his office. In cross-examination he has stated that the impression of rubber stamp "Sub-divisional Marketing Officer, Burdwan" were not of his office as shown in the document marked (Y series). He has, further, stated that he did not see the impugned rubber stamp bearing the seal "Sub-divisional Marketing Officer, Burdwan" nor he saw anybody to put the stamp.

25. From the evidence discussed above, therefore we find that the contents of the documents marked (Y series) go to show that by these documents certain market rates were being furnished to the hospital authority by the office of the marketing officer under the signature of accused Satya Mullick or Haro Prasad Chatterjee. The contents further show that some time forwarding letters were being issued with the market rates furnished and certain memo numbers were given therein. The evidence on record prove that the memo numbers of the issuing office appearing in the said documents also appear in a note book written by the accused Satya Mullick and found from his house. The evidence on record also prove that the stamp and seal appearing thereon are neither those of the Sub-divisional Agricultural Marketing Officer nor were those

memos issued by the said office. It has also been proved that accused Satya Mullick and Haro Prasad Chatterjee, the signatories in these typed letters, were not the Sub-divisional Agricultural Marketing Officer as indicated therein. These circumstances lead to the only conclusion that the signatories were the authorities of these documents and they signed the documents knowing the contents thereof. In view of the above conclusion we fully satisfied that the contents of the documents have been proved by circumstantial evidence and the contents of the said documents can be treated as legal evidence in the instant case.

26. Before we conclude our general discussions about the case presented before us we would like to advert to another submission made by Mr. Balai Ray appearing on behalf of the contractor Netai Hari and his employee Nilkantha. Mr. Ray contended that the ice being a non-tendered article, the contractor was entitled to offer any rate for supply of the same and it was for the hospital to accept or refuse supply at such rate. According to Mr. Ray even if the market rate was less than Rs. 10/- per maund of ice, as contended by the prosecution, the contractor was within its right to charge Rs. 10/- being the rate offered by him and even if such rate was not acceptable to the hospital authority, there cannot be any question of inducement or cheating because it was the prerogative of the contractor to fix his own rate. Mr. Ray contended that even if the contractor submitted forged market rates showing ice at Rs. 10/- per maund, such user of forged documents cannot be said to be for the purpose of cheating and therefore all the charges framed against the accused must fall. We are, however, unable to accept this contention of Mr. Ray.

27. As already discussed, the material on records clearly prove that the contractor was to be paid according to the rates prevailing in the market, which were to be supplied by the Marketing Officer and if the accused submitted such forged market rates showing inflated price of ice it was to induce the hospital authority to pay at such inflated rates. As we have already indicated the rates shown in the bills submitted by the contractor in his bills were Rs. 10/- and the market rate of ice, as it appears from the evidence of P.W. 4 Marketing Officer, was at the material time Rs. 2.50 n.p. per maund to Rs. 3/- per maund, while during the summer the rate fluctuated between Rs. 2.50 n.p. per maund and Rs. 6.50 n.p. per slab of three maund 30 seers. In answer to a question put by the Court this witness stated that ice was never sold at Burdwan at Rs. 10/- per maund. By memo being number 1719/BCH dated November 5, 1959 addressed to the Sub-divisional Marketing Officer, Sadar Burdwan (exhibit 10/3) which was duly received by office of P. W. 5, the hospital authority wanted to know the market rates for the month of October 1959 of certain commodities including ice and the office copy of the reply given by the Marketing Officer through

his memo number 1740/V-23, dated November 16, 1959 (Ext. 10/2) show that the rate of ice was given as Rs. 2.50 per maund. The evidence of Bhola Nath Khanna, P. W. 8 who dealt in ice also proves that in 1959-60 the wholesale rate of ice was Rs 3.75 per maund and the retail rate of sale on credit was Rs. 5/- per maund. The evidence of P. W. 4 and P. W. 8 and the contemporaneous document (Ext. 10/2) clearly show that at the time the rate of ice was much less than Rs. 10/-. On behalf of the contractor, however, a number of documents have been exhibited to indicate that the hospital authority accepted the tender rate of Rs. 10/- per maund for ice to be supplied by the contractor Netaihari for the period from 1.4.57 to 31.3.58. Relying on these documents it has been contended that price of ice as deposed to by the Marketing Officer is wholly unacceptable. In the instant case we are not concerned with rate of ice prevailing before or after the period now under consideration by us, and it is immaterial whether the rate offered by Netai Hari at Rs. 10/- per maund of ice were accepted by the Hospital authority for other periods. Here we are only concerned with market rates during the period March, 1959 to February, 1960 and whether the contractor while submitting his bills furnished inflated market rates. The evidence clearly prove that market rate at the material time as certified by the marketing officer was much less than the market rate prevailing and that rate at which the bills were submitted were inflated rates. The evidence clearly prove that the contractor was to submit market rates along with the bills and the documents showing the market rates (Y series) prove that the rates indicated therein were shown at Rs. 10/- per maund of ice.

28. Now that we have completed our general discussion on the facts of the case and the points raised thereon by the defence, let us now take us for consideration the individual items of evidence by which the prosecution claimed to have proved the charges levelled against the accused.

29. The charge of conspiracy framed against the accused persons recites that they between the period from March 1959 to February 1960 conspired to cheat the B. C. Hospital, Burdwan and some of its officers by dishonestly inducing them to recommend payments to, pass and deliver an excess amount of money against inflated bills drawn by Netai Hari Ray as also causing to commit and or by committing forging of market rates submitted with those bills. An argument was canvassed by Mr. Banerjee appearing on behalf of the appellant Satyakinkar, that the charge clearly indicate that there were two objects of conspiracy viz. to cheat the B. C. Hospital by submitting inflated bills and another to commit forgery in respect of market rates submitted with those bills. Mr. Banerjee urged that the forgery as stated in the charge was for submission of the bills and for cheating as now being contended by the prosecution. In our view there is no substance in this contention of Mr. Banerjee. The conspiracy

as stated in the charge was for cheating the hospital authority and the manner in which such cheating was done has been detailed in the charge by specifically mentioned that it was done by submission of inflated bills as also by causing to commit and/or by committing forgery in respect of market rates submitted with those bills.

30. For the purpose of ascertaining whether this charge of conspiracy has been proved or not we will take up for consideration both oral and documentary evidence relating to submission of monthly bills for supplies of a particular month and we first take up the evidence relating to the month of January, 1960.

31. By a memo bearing number 157 dated 4th February, 1960 the Resident Medical Officer of Bejoy Chand Hospital, Burdwan asked the Sub-divisional Marketing Officer, Burdwan to furnish the rates for the month of January 1960 of certain articles including ice. Dr. R. C. Roy, who was the Resident Medical Officer at that time (P. W. 16) deposed that the above memo was sent by him under his signature to the Sub-divisional Marketing Officer. This memo has been marked Ext. 10/5. He, further, stated that the handwriting portion appearing in the said typed letter is not of his office. The relevant entry in the issue register of the hospital in respect of this letter has been proved by P. W. 1 as to be in the handwriting of Makhan Chowdhury who was the head clerk of the hospital and figured as an accused in the case but was acquitted. This entry in the issue register has been marked Ext. 1/3. This original memo (Exhibit 10/5) which should have been in the office of the addressee, the Marketing Officer was seized from the house of the accused-appellant Satyakinkar Mullick and is the item number 3 in the seizure list (Exhibit 25/12) prepared in respect of the said seizure. In the said memo (exhibit 10/5) there is a hand written endorsement which reads as follows :—

“Memo No. 9 M.O.

Dt. 13-2-60

Reply :—His memo No. 157 dt. 4-2-60

The market rate of the articles stated in his memo under reference is furnished herewith.

Sd/- Illegible.

13-2-60

Marketing Officer, Sadar Burdwan
(Burdwan Collectorate)”.

Above the words ‘Marketing Officer’ a signature appears which has been proved by P.W. 5 Gauri Aich and the Handwriting Expert as that of accused Satyakinkar Mullick and the signature has been marked Ext. 12/23. Almost in the identical language of the above quoted endorsement a typed letter was addressed to the Resident Medical Officer, Burdwan as if the same was being issued from the office of the Marketing Officer, Sadar Burdwan in reply to the above quoted memo number 157 dated 4.2.60. This reply reads follows :—

GOVERNMENT OF WEST BENGAL

Office of the Marketing Officer, Sadar Burdwan, Memo No. 9 M. O. dated, Burdwan, the 13th Feby. 1960.

To

The Resident Medical Officer,
Bejoy Chand Hospital,
Burdwan.

Ref :—His Memo. No. 157 dated 4.2.60.

The market rates of the articles, stated in his memo. under reference are furnished herewith.

Enclo :—List of price.

Sd/- Illegible. 13.2.60.

Sub-divisional Marketing Officer,
Sadar, Burdwan.

(Burdwan Collectorate).

The signature, appearing in the just quoted letter above the words "Sub-divisional Marketing Officer" has been proved to be that of accused Satya Mullick and the signature has been marked Ext. 12. With the above quoted memo was enclosed the rates of different articles including ice which was shown as Rs. 10/- per maund. This enclosure of market rates also bear the signature purportedly that of the Collector of Burdwan and this signature has been proved also to be that of Satya Mullick (Ext. 12/1). The letter with the signature (Ext. 12) and the enclosure with the signature (Ext. 12/1) have been collectively marked Y for identification. This letter as we have stated earlier bears a memo number 9 M.O. dated Burdwan 13th February 1960. This memo number finds place in the Exercise Book which was being used as a Peon-book and this book was seized from the house of Satya Kinkar Mullick. The entries in the exercise book have been proved by P.W. 22 to be in the handwriting of Satya Kinkar Mullick excepting the initials in the last column. This exercise book has been marked Ext. 24. Against the date 13.2.60, in the said exercise book the following entry appears :—

"9 M.O. R.M.O. B.C. Hospital, Burdwan sends market rates of the articles sent under the memo number 157 dated 4.2.60".

Though the contents of the documents (marked Y for identification) and the handwriting appearing in the memo No. 157 dated 4th February 1960 (Exhibit 10/5) have not been proved by any of the witnesses, the circumstantial evidence on record clearly prove that the accused appellant Satya Kinkar Mullick was the author thereof. The circumstances proved are (i) the signatures appearing thereon are those of Satya Mullick, (ii) Exhibit 10/5 was recovered from the possession of Satya, (iii) handwritten endorsement appearing thereon contains a reference of a memo being number 9 M.O. dated 13.2.60, (iv) the same memo number appears in the document

containing the signature of Satya Mullick (marked Y for identification), (v) the memo number appearing thereon finds place together with the contents of the document (marked Y) in the Exercise Book (Ext. 24) proved to be in the handwriting of accused Satya Mullick and (vi) Ext. 24 was recovered from his house.

32. The enclosure of the document (marked Y) containing the market rates bear the signature of the Chief Medical Officer Dr. U.N. Saha, who in his deposition proved the signature and stated that he put the signature when he received the bills of contractor. The signature of the Chief Medical Officer has been marked Ext. 33/8. The corresponding bill of Netaihari Roy for this particular month has been exhibited and marked 18/11. The signature of accused Netaihari appearing in the bill has been marked Ext. 12/93 and that of the Chief Medical Officer thereon Ext. 28/12. The oral and documentary evidence, therefore, clearly prove that the original letter asking for market rates (exhibit 10/5) issued by the hospital authorities was intercepted and found its way to the house of accused Satya Kinkar Mullick wherefrom it was recovered and seized. On this letter a handwritten endorsement was made under the signature of Satya to indicate the reply that was to be given. A formal letter in reply to exhibit 10/5 was then issued in the line indicated in the above endorsement enclosing there with the market rate for the month of January, 1960, as asked for, under the signature of accused Satya Mullick and this letter and the enclosure were sent along with the bill of Netai Hari Roy for the month of January 1960 so as to induce the hospital authorities to pass the bill according to the inflated rate of ice at Rs. 10/- per maund as shown in the forged market rate. As we have already discussed, the Sub-divisional Marketing Officer in his deposition disowned the above letter and the enclosure as having been sent by him and asserted that the stamp and seal of Sub-divisional Marketing Officer, Burdwan appearing thereon are not of their own office. In fact, a genuine letter of the Sub-divisional Marketing Officer proved in this case by P.W. 4 (exhibit 10) show, as depose to by the Marketing Officer, that they have no such stamp or seal. Thus, there cannot be any manner of doubt that without a conspiracy amongst Netai Hari Roy, the contractor S.K. Mullick and some staff of the hospital, the accused Netai Hari could not have succeeded in cheating the hospital authority to obtain payment of the bill at inflated rates.

33. Let us now take up the preparation of bill for the month of February, 1960. By memo number 370 dated 29.2.60 the Resident Medical Officer of the hospital asked the Sub-divisional Marketing Officer, Burdwan to furnish the market rates of different articles including ice in the month of February 1960. This original memo has been proved in this case and marked 12/37. That this memo was issued

from the hospital would be evident from the issue register of the hospital and the relevant entry has been proved by P.W. 1 and marked Ext. 1/6. This original memo, though addressed to the Sub-divisional Marketing Officer, was recovered from the house of accused Satya and was seized under the seizure list (exhibit 25/12). The original typed letter sent in reply thereto has been proved to be under the signature of accused Satya Mullick describing himself a Sub-divisional Marketing Officer and the signature has been marked (exhibit 12/2) and the document containing the signature has been marked Y/1 for identification. This document Y/1 bears a memo number being 16 M. O. dated 5th day of (month not mentioned) 1960 and indicates that it was being sent in reply to the memo number 370 dated 29.2.60. The memo also bears the signature of the Chief Medical Officer as the same was sent along with the bill of Netai Hari Roy for the month of February 1960 and the said signature of the Chief Medical Officer has been marked (exhibit 33/9). Needless to say this memo was seized from the hospital. A typed copy of this memo (Y/1) containing the signature of Satya Mullick (signature Ext. 12/10, copy marked Y/17) was recovered from the house of Satya Mullick being the item number 6 of the seizure list (Ext. 25/12) and another copy from the house of the contractor Netaihari Roy being the item number 41 in the seizure list (exhibit 25/5). The copy that was found in the house of Netaihari also contain the signature of Satya Mullick and the said signature of Satya Mullick appearing thereon has been marked Ext. 24/7. P.W. 3 Sachindra Nath Banerjee, who was a witness to the search in the house of Netaihari deposed to the effect that a typed sheet bearing memo number 16 with rates of several articles appearing to be issued was also seized under the seizure list, prepared (exhibit 25/5). The exercise book (Ext. 24) also shows that on 5.3.60 a memo being number 16 M.O. was addressed to R.M.O. B. C. Hospital, Burdwan in reply to his memo number 370 dated 29.2.60. The bill for this particular month submitted by the contractor Netaihari along with the market rate Y/1 has been proved and there is no dispute that Netaihari obtained money on the basis of the bill so submitted which included an amount for supply of ice calculated at the rate of Rs. 10/- per maund. So far as the month of February, 1960 the documents clearly indicate that the typed copies of the original forged market rates bearing the signature of Satya Mullick sent to the hospital authorities were recovered both from the house of Netaihari Roy, and Satya Mullick and issuance of the said forged market rates also find place in the exercise book (exhibit 24) written by and recovered from the house of Satya Mullick. The conspiracy amongst Satya, Netaihari and some staff of the hospital in this month also stand conclusively proved. Though the charge of conspiracy was for the period upto February, 1960 we have relief

upon documents which came into existence subsequent thereto for the reasons and on the principles discussed by us earlier.

34. Coming to the transactions relating to the month of December, 1959 we find that Memo number 15 dated 6th January, 1960 was addressed to the Sub-divisional Marketing Officer, Sadar, Burdwan, by the Resident Medical Officer, Bejoy Chand Hospital, Burdwan asking for market rates of certain articles including ice for the month of December, 1959. The original memo has been proved by P.W. 18 Naresh Narayn Biswas, a clerk of the hospital, to be under the signature of the then Resident Medical Officer and the said memo has been marked exhibit 12/41. The relevant entry in the issue register of the hospital has been exhibited and marked exhibit 1/2. The memo (Ext. 12/41) was seized from the house of Satyakinkar Mullick and is item number 12 in the seizure list (Exhibit 25/12). The draft reply written in hand is under the signature of the accused Haro Prasad Chatterjee and his signature has been marked exhibit 23/9. This manuscript was also recovered from the house of Satyakinkar Mullick being one of the letters under item 11 of the seizure list (Ext. 25/12). The original typed reply containing the market rates is also under the signature of Haro Prasad Chatterjee and this was seized from the hospital. The original document has been marked Y/9 for identification and the signature of Haro Prasad Chatterjee appearing thereon as Marketing Officer has been marked exhibit 23/21. The reply containing the market rate also bear the signature of the Chief Medical Officer and the said signature has been marked exhibit 33/7. The carbon copy of the reply containing the market rate also bear the signature of Haro Prasad Chatterjee. The carbon copy has been marked Y/19 for identification and the signature of Haro Prasad has been marked Ext. 23/20. This carbon copy was also recovered from the house of the accused Satya Mullick and finds place as one of the letters under item number 11 of the seizure list (exhibit 25/12). The manuscript under the signature of Haro Prasad Chatterjee and the original typed letter which was the forwardidg letter of the market rate submitted for the month of December, 1959 bears memo number 4 M.O. dated 14.1.60 and purports to be in reply to the memo number 15 dated 6.1.60 of the Resident Medical Officer, Bejoy Chand Hospital. Issuance of this memo purportedly by the Marketing Officer finds place in the exercise book (Ext. 24) written by Satya Mullick and recovered from his house. The entry in the said exercise book in respect of this letter shows that market rates were being sent to the Resident Medical Officer with reference to his memo number 15 dated 6.1.60. The relevant bill for supplies of December 1959 submitted by the contractor along with the above market rate marked (Y/9) is exhibit 18/12 and the signature of the contractor Netai Hari Roy thereon has

been marked exhibit 12/95. The signature of the Chief Medical Officer in token of sanction of the said bill is marked exhibit 28/14.

35. The documents relating to the month of December 1959 discussed above unerringly prove that the accused Haro Prasad Chatterjee, Satya Mullick and Netaihari Roy were in league, as without mutual connivance, the draft of the reply to be sent under signature of Haro Prasad Chatterjee could not have been recovered from the possession of Satya Mullick nor could have, the carbon copy of the market rate under the signature of Haroprasad have been found in his house. The issuance of the reply through exercise book written under the hand of Satya Mullick and recovery of the same from his own house and the submission of original market rate under the signature of Haroprasad along with the bill for the supplies for the relevant month under the signature of Netai Hari Roy could not have been possible unless they all conspired together.

36. The practice of the hospital to send letters asking for rates either through peon-book or through post was obviously given a go-by by some of the hospital staff, as otherwise the original memos issued by the hospital authority and addressed to the Sub-divisional Marketing Officer could not have been recovered from Satya Mullick. It is true that one of the hospital employees namely, Makhan Chowdhury, who was also arraigned in this case have been acquitted but facts and circumstances disclosed in this case clearly indicate that one or other of the hospital employees was in league with the other three accused persons, as without the assistance and connivance of the hospital staff the accused persons could not have taken delivery of the letters addressed to the Sub-divisional Agricultural Marketing Officer.

37. Since the transaction for the month of December, 1959, January, 1960 and February, 1960 clearly show that there was a conspiracy amongst the accused persons namely, Netaihari Roy, Satya Mullick and Haro Prasad Chatterjee (since deceased) and some hospital employees to cheat the hospital authority by forging market rate-sheets and submitting inflated bills, we need not go into further discussion in respect of transactions of other months mentioned in the charge.

38. So far as accused Nilkanta is concerned the only evidence that has been adduced in the case is that he sometime took delivery of some letters from the hospital addressed to the Sub-divisional Marketing Officer asking for market rates and in support of the same signature of Nilkanta appearing in the issue register of the hospital in token of receipt of some such letters have been proved (Exts. 4/3 dated 4.3.59, 4/4 dated 4.5.59, 4/5 dated 6.6.59 and 4/6 dated 6.7.59). But then receipt of such letters by itself do not conclusively prove that Nilkanta was a party to the conspiracy as he might have accepted those letters on behalf of his master namely, Netaihari Roy and handed

over the same to him, without knowing that the same were to be utilized for submission of inflated bills. Mere receipt of letters by Nilkanta on behalf of his master do not conclusively prove that he was aware of, or was a party to the conspiracy hatched by the other accused persons.

39. On a consideration of the materials on record, we are satisfied that the prosecution has been able to prove, beyond all reasonable doubt, the charge of conspiracy against Satyakinkar Mullick and Netai Hari Roy, two of the appellants before us, but the charge of conspiracy has not been proved conclusively so far as Nilkanta is concerned.

40. As regards the specific charge of cheating framed against the appellant Netai Hari it has been proved in this case that Netai Hari submitted inflated bills by showing the price of ice at Rs. 10/- per maund even though the price was much less and for the purpose of receiving payments on such inflated rate he induced the hospital authority to recommend payments by enclosing forged market rates with the same. There is no dispute that Netai Hari obtained payments at the inflated rates shown in his bills and therefore the charge U/s. 420 of Indian Penal Code has been conclusively proved against Netaihari. So far as the charge U/s. 471 of Indian Penal Code is concerned, we have already discussed and found that the market rates submitted with the bills were forged as the same were not sent by the Marketing Officer from whom they were asked for and the rate sheets submitted with the bills were prepared either by the accused Haro Prasad Chatterjee or Satya Mullick and the recovery of copy of such market rates from the house of accused Netai Hari unmistakably prove that he was fully aware that the same were forged. The charge U/s. 471 of the Indian Penal Code against Netaihari has therefore also been conclusively proved. In absence of any evidence on record that Nilkanta submitted the forged market rate sheets or that he was aware of the same, the charge U/s. 471 of Indian Penal Code against Nilkanta Chatterjee, however, fails. As regards the charge under Section 468 of the Indian Penal Code against Satya Mullick, we have already found that some of the documents (marked Y series) were signed by Satya Kinkar Mullick posing himself as the Sub-divisional Marketing Officer, Sadar, Burdwan though he never worked in such capacity. There is thus no manner of doubt that Satya forged these documents and he used if for the purpose of cheating the Bejoy Chand Hospital and its officers to dishonestly induce them to recommend, pass and make payment an excess amount of money against inflated bills of the contractor Netaihari. The charge U/s. 468 of the Indian Penal Code therefore has been brought home against accused Satyakinkar Mullick. As regards the charge U/s. 419 of the Indian Penal Code there is no evidence on record that Satya impersonated as Sub-divisional Marketing Officer and hence this charge must fail.

41. On the conclusions as above convictions of Netai Hari Roy in

respect of all the charges framed against him are upheld. The convictions of Satya Kinkar Mullick for the charges under Sections 120B/420 of the Indian Penal Code and under Section 468 of the Indian Penal Code are upheld but the conviction under Section 419 of the Indian Penal Code is set aside. The convictions and sentences passed against Nilkantha Chatterjee for both the charges framed against him are hereby set aside.

42. Coming now to the question of sentence we find that the case against the appellant was instituted as far back as 17/7/60 and the sentences were imposed on them in May, 1969 and during all these period the accused persons must have suffered great mental agony and angrish. We also find from the record that both the appellants Netai Hari Roy and Satya Kinkar Mullick have under-gone detention for some period during the investigation of the case. Besides Satya Mullick has also undergone imprisonment after his conviction till his release pursuant to the order of this Court after admission of his appeal. We are not unmindful of the fact that the offences for which the above two appellants have been found guilty are compulsorily punishable with substantive imprisonment, but than, these two appellants will be entitled to set off in accordance with the provisions of Section 428 of the Code of Criminal Procedure, 1973 in case any substantive imprisonment is imposed upon them. Considering all these facts and circumstances, we are not inclind to send these two appellants behind the bar again after such a long lapse of time. Accordingly, we reduce the sentence of the appellants to the period undergone while maintaining the sentences of fine imposed upon them for the convictions which are being upheld by us.

43. In the result, the Criminal Appeal No. 351 of 1969 is allowed and the convictions and sentences passed against Nilkanta Chatterjee under Sections 120B/420 and 47 of the Indian Penal Code are hereby set aside and he is acquitted of the said charges. He is discharged from his bail bond. Criminal Appeal No. 314 of 1969 preferred by the appellant Satya Kinkar Mullick is allowed in part. The order of conviction and sentence passed against him under Section 419 of the Indian Penal Code is hereby set aside and he is acquitted of the said charge. His convictions under Section 120B/420 and 468 of the Indian Penal Code are upheld but the sentences passed against him for the above convictions are reduced to the period already undergone but the sentence of fine imposed for the above two convictions are maintaind. Criminal Appeal No. 350 of 1969 preferred by Netai Hari Roy is dismissed subject to the modification regarding substantive sentence of imprisonment which is reduced to the period already undergone during investigation, with the sentence of fine maintained.

Bhattacharya, J. : I agree.

P. R.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Murari Mohan Dutt and Mr. Justice
Dhires Chandra Chakraborti

Decision : July 6, 1978

Messrs. B. C. Paul & Sons (P) Ltd. Petitioner
Versus

Union of India Opposite party*

Arbitration Act (10 of 1940), Secs. 2(c) & 33—Application under Sec. 33—Existence and validity of arbitration agreement challenged—Forum of application is to be determined according to provision of C. P. Code—No Civil Court in West Bengal to entertain, hear and dispose of such application wherein Union of India is impleaded as opposite party—Section 20 (c), C.P.C. is not attracted in this case—No relief available to petitioner in instant case on application under section 33 of Arbitration Act.

The petitioner company filed an application under section 33 of the Arbitration Act in the first court of the Subordinate Judge at Alipore. The learned Judge rejected the said application on the ground that he had no jurisdiction to entertain the application. Hence this Rule.

HELD : Section 33 of the Arbitration Act does not indicate any court to which such an application may be presented. Section 2(c) defines the word 'court'. The 'court' under the Arbitration Act, means a civil court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit. In other words section 2(c) lays down the forum where an application can be filed. If the subject matter of a reference be taken to be the subject matter of a suit, then the forum of such a suit can be ascertained by reference to the provisions of the Code of Civil Procedure. Now if the petitioner company wants to file such a suit, then it will have to ask for declaratory reliefs being based on questions forming the subject matter of the reference. The forum of such a suit would be the court within whose jurisdiction the opposite party resides or carries on business. In the facts and circumstances of the instant case the opposite party, Union of India cannot be said to be residing or carrying on business within the State of West Bengal. That being so, such a suit could not be filed by the petitioner company against the opposite party (Union of India) in any court within the State of West Bengal. Be that as it may, in view of section 2(c) read with section 33 of the Act, any court in the State of West Bengal will not be competent to hear and dispose of the application under section 33 of the Act presented by the petitioner. Even if it is taken that such a suit may be instituted by the petitioner as one on contract, still then it cannot be instituted in any court within the State of West Bengal. Under clause (c) of section 20 of the Code of Civil Procedure, a suit can be

*Civil Rule no. 1523 of 1972.

filed in a court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. It is now well-settled that in the case of a contract the cause of action arises in the places following: (1) the place where the contract has been entered into, (2) the place where the contract has been performed or is required to be performed under the terms thereof, and (3) the place where, in terms of the contract, any payment has to be made. The petitioner in the instant case has not made out any case that even a part of the cause of action has arisen within the State of West Bengal and there is no material on record to hold in that regard.

In these circumstances, the learned Subordinate Judge was right in holding that he had no jurisdiction to entertain and hear the application under section 33 of the Arbitration Act.

Manindra Nath Ghose and Samarendra Nath Banerjee ... for the Petitioner
No one ... for the Opposite party

The judgment of the Court was as follows :—

Dutt, J. : This Rule is directed against order no. 69 dated February 8, 1972 of the Subordinate Judge, First Court, Alipore. By the said order, the learned Subordinate Judge dismissed the application of the petitioner under Section 33 of the Arbitration Act, 1940.

2. It appears that the opposite party, the Union of India, invited tenders from Madras for the supply of oil cocoanut on certain terms and conditions. The petitioner submitted a tender for the supply of oil cocoanut. It was alleged that the opposite party prescribed a new standard of specifications whereupon the petitioner claimed an extra charge at the rate of Rs. 25/- for such new specifications. Ultimately the Union of India accepted the tender as submitted by the petitioner and issued the letter of acceptance to the petitioner from Madras. It was, however, alleged by the petitioner that by accepting such tender the opposite party did not accept the extra charge which was claimed by the petitioner for new specifications. Further, the opposite party imposed a condition namely, the furnishing of security deposit of 5 per cent by the petitioner to which the petitioner never agreed. Upon the said allegations, it was the case of the petitioner that there was no concluded contract and, accordingly, the arbitration clause, which was contained in that contract, never came into existence. The opposite party, however, claimed that because of the non-performance of the terms of the contract, the opposite party had suffered damages to the extent of Rs 60,340.44 and informed the petitioner that it would refer the matter to arbitration. In the application under Section 33, the petitioner has challenged the existence and validity of the arbitration agreement as contained in the alleged contract, which, according to the petitioner, was not a concluded contract.

3. The opposite party entered appearance in the proceedings which arose out of the said application under section 33 and opposed the same.

The opposite party denied the allegations made in the application. It was the case of the opposite party that the contract was a concluded one and according to the arbitration clause, it was binding upon the parties. It was further contended by the opposite party that the learned Subordinate Judge had no jurisdiction to entertain and hear the application under section 33.

4. The only question that had to be considered by the learned Subordinate Judge was whether he had jurisdiction to hear and dispose of the application under section 33. After considering the submission made on behalf of the parties and also the provision of clause 20(3) of the alleged contract, the learned Subordinate Judge came to the finding that he had no jurisdiction to entertain the application. In that view of the matter, he dismissed the application under section 33. Hence this Rule.

5. Mr. Ghose, learned Advocate appearing on behalf of the petitioner, submits that as the petitioner had challenged the very existence of the arbitration agreement which was embodied in the alleged contract, the learned Subordinate Judge was not justified in referring to clause 20 (3) of the said contract for the purpose of ascertaining whether he had jurisdiction to entertain and hear the application under section 33. Further, it is submitted by Mr. Ghose that in the facts and circumstances of the case the learned Subordinate Judge was wrong in holding that he had no jurisdiction so far as the application under section 33 was concerned.

Section 33 provides as follows :

"Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

Section 33 does not give any indication as to the Court where an application under that section can be filed. Section 2(c), however, defines the word 'Court' as meaning civil court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court. In our view, section 2(c) lays down the forum where such an application under section 33 can be filed by an aggrieved party. The questions forming the subject-matter of reference in the instant case would be as follows :

(1) Whether there was a concluded contract ; and

(2) if so, whether the opposite party is entitled to recover damages to the extent of Rs. 60340.44 from the petitioner.

Now we are to consider which court would be entitled to entertain a suit having for its subject-matter the above questions. The forum of the suit will, however, be according as to who will be the plaintiff in such a suit. But whether the petitioner or the opposite party brings such a suit against the other, the forum will have to be decided in accordance with the provisions of the Code of Civil Procedure. Now, if the petitioner files the suit, he has to ask for declaratory reliefs in terms of the questions that would be the subject-matter of the reference. The forum of such suit would be the court within whose jurisdiction the opposite party resides or carries on business. Admittedly, in the facts and circumstances of the instant case the opposite party Union of India cannot be said to reside or carry on business within the State of West Bengal. Accordingly, such a suit could not be filed by the petitioner against the opposite party in any court within the State of West Bengal. If the suit is to be instituted by the opposite party, in that case, it may be filed within the State of West Bengal as the petitioner resides or carries on business or works for gain within this State. Be that as it may, in view of section 2(c) read with section 33 of the Arbitration Act, any court in the State of West Bengal will not be competent to hear and dispose of the application under section 33 at the instance of the petitioner. Even if we consider the suit that may be filed by the petitioner as one on contract, still it cannot be filed in any court within the State of West Bengal. Under clause (c) of section 20 of the Code of Civil Procedure, a suit can be filed in a court within the local limits of whose jurisdiction the cause-of-action, wholly or in part, arises. It is now well-settled that in the case of a contract, the cause-of-action arises in the following places :

(1) The place where the contract has been entered into;

(2) The place where the contract has been performed or is required to be performed under the terms thereof;

(3) The place where, in terms of the contract any payment has to be made.

The petitioner has not made out any case that a part of the cause-of-action has arisen within the State of West Bengal and we do not find any material on record to hold in that regard. Mr. Ghose also cannot say how and on what basis the Court of the Subordinate Judge at Alipore has jurisdiction to hear the said application under section 33. In these circumstances, the learned Subordinate Judge has rightly come to the conclusion that he had no jurisdiction to entertain and hear the application under section 33. There is, however, some justification for the contention as made by Mr. Ghose that the learned Subordinate Judge should not have referred to the terms of the alleged contract, the very existence

of which has been challenged in that application. Be that as it may, in view of the aforesaid reasons, the court of the learned Subordinate Judge has no jurisdiction to hear and dispose of the application.

6. The Rule is accordingly discharged, but there will be no order for costs.

7. Mr. Banerjee, learned Advocate appearing on behalf of the petitioner, orally prays for a certificate for appeal to the Supreme Court under Article 133(1) of the Constitution. It is doubtful whether such an oral application can be made. Be that as it may, we refuse to grant a certificate, as prayed for.

Chakraborti, J. : I agree.

S.P.T.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Amiya Kumar Mookerji

Decision : July 25, 1978

Dr. S. C. Pal & Ors. Petitioners

Versus

Shri J. Sarma Sarkar & Ors. Respondents*

Commission of Inquiry Act (60 of 1952), Sec. 3—One Member Commission constituted under—Terms of reference—Scope of enquiry—Misuse of power by public servants—Complaint against public servants—who are public servant?—Whether office-bearers of Indian Council of Medical Research and Cholera Research Centre, are public servants and come within scope of Inquiry.

A distinction is generally made between the common people and certain classes of persons in the service and pay of the Government or of persons exercising various public functions, who are generally included within the expression, "public servants". There are several offences which can only be committed by the public servant. Section 21 of the Indian Penal Code has not defined the expression 'Public Servant' but the section enumerated various functionaries who have been described as public servants. A public servant is a person who discharges some public duty. Clause Ninth of Section 21 read with its Explanation no. 2 is not attracted in the instant case. According to Explanation no. 2, the person who in fact, discharges the duties of a particular office which brings him under any of the descriptions of public servants, is for all the purposes of the Code, a public servant whatever legal defect there may be in his right to hold the office. The absence of a formal appointment is immaterial where a person is in

*Civil Rule No. 2756 (w) of 1978.

actual control of a situation as a public servant. Clause Ninth starts with the expression 'every officer'. The word officer means a holder of some office, to whom certain functions of the Government have been delegated.

The Indian Council of Medical Research is a registered society. The said council is an apex Organisation for the medical research in the country. The funds required for its activities are made available by the Central Government and its accounts are being audited by the Comptroller and Auditor General of India. But still then, it cannot be regarded as a department of the Central Government and as such the officers of the said council can not be taken as public servants. The expression 'public servant' has a particular meaning. True it is that the expression has not been defined in section 21 of the Indian Penal Code. But unless a person comes within the description as enumerated in various clauses of section 21 of the Indian Penal Code, he cannot be said to be a public servant. The dictionary meaning of the public servant is government servant. But all government servants are not public servants. The court can not extend the definition of the public servant and hold that any person who serves the community and the people and carries out transactions for the benefit of the public and not for private profit comes within the description of a public servant. Here, the Indian Council of Medical Research is neither a public authority nor has any public or statutory duty to perform, so the officers of the Cholera Research Centre which is one of the centres under the Indian Council of Medical Research are not public servants.

The purpose for which the instant commission was constituted is to enquire and find out the misuse of powers by a public servant by which the democratic rights of the citizen were curbed and nullified.

The commission of Inquiry is a creature of statute. Under section 5(2) of the Act the Commission has got the power to require any person to furnish information on such points and matters as, in the opinion of the Commission, may be useful for or relevant to the subject matter of the enquiry. But at the same time, the Commission cannot travel beyond the terms of the reference. Now, looking at the terms of reference it appears that clause 2(a)(i) of the Notification refers to the misuse of power by public servant. It appears that the Respondents excepting Respondent no. 4, who are officers of the Council are not public servants and clause 2(a)(i) of the Notification is not attracted and accordingly, the Commission has no jurisdiction to enquire into the complaint filed by the Officers Association, Cholera Research Centre against the Respondents 1 to 3.

Sub-clause (ii) of clause 2(a) of the Notification in question is independent and is not dependent upon clause (i), sub-clause (i) deals with the misuse of power by public servants themselves and

sub-clause (ii) deals with aiding or abetting by any person or persons having official authority or curbing such domestic rights of the citizen. In view of the allegations made in the complaint, the Commission has got jurisdiction to enquire into only that part of the allegations with respect to which the Petitioner no. 4 and the secretary, Department of Health, Government of West Bengal have aided and abetted the other Respondents in administering Fanasil to human population.

A Writ of Mandamus has been issued commanding Respondent no. 1 not to enquire into other allegations in the complaint filed by the Officer's Association except those allegations in the complaint by which the aiding or abetting by the Health Secretary to the Government of India and the secretary to Government of West Bengal, Department of Health have been referred.

Cases referred to :—

- (1) *D. G. of Health Services v. Bikash Chatterjee*, AIR 1969 Cal 525
 - (2) *Sabhajit Tewari v. Union of India*, AIR 1975 SC 1329
 - (3) *Sukhdev Sing v. Bhagat Ram*, AIR 1975 SC 1331
 - (4) *Rajasthan State Electricity Board v. Mohanlal*, AIR 1966 SC 1857
- | | | |
|--|--------|----------------------|
| R. C. Deb, N. N. Goswami and M. Mullick | ... | for the petitioners |
| N. N. Gooptu and P. K. Mondal | ... | for Respondent no. 2 |
| Somnath Chatterjee and Nigam Chakraborty | .. | for Respondent no. 4 |
| M. K. Basu | | for Union of India |

The judgment of the Court was as follows :—

This Rule is directed against Order No. 6 dated 21st of April, 1978 passed by Sri J. Sarma Sarkar, a member of a Commission of Inquiry constituted under Section 3 of the Commissions of Inquiry Act, 1952.

2. The petitioner Nos. 1 and 2 are the Director and the Deputy Director of Cholera Research Centre which is one of the Centres under the Indian Council of Medical Research, New Delhi. The third petitioner is the Director General of the said Council and the fourth petitioner is the Health Secretary to the Government of India, Ministry of Health and Ex-Officio Vice-President of the Council. The Government of West Bengal issued a notification dated 12th of August, 1977, appointing a Commission of Inquiry, consisting of Sri J. Sarma Sarkar, a retired Judge of the Calcutta High Court. The relevant provisions of the said notification are set out hereinbelow :—

“Whereas there is a widespread demand from different sections of public for an inquiry into allegations of persistent misuse of authority to power during the period from the 20th March, 1970 to the 31st May 1975 whereby the citizens in this State were deprived of their democratic rights ;

And whereas the Governor is of opinion that it is necessary to appoint a Commission of Inquiry for the purpose of making inquiry into definite matters of public importance, that is, matters relating to such persistent misuse of authority of power during the period from the 20th March 1970 to the 31st May, 1975 as hereinafter specified :

And whereas no Commission of Inquiry has been appointed by the Central Government to inquire into the said matters ;

Now, therefore, in exercise of the power conferred by Section 3 of the Commissions of Inquiry Act, 1952 (60 of 1952) the Governor is pleased hereby to appoint a Commission of Inquiry consisting of Shri J. Sarma Sarkar, retired Judge of Calcutta High Court.

2. The terms of reference of the Commission of Inquiry shall be as follows :—

(a) to inquire and to find out

(i) what, if any misuse of power by public servants took place during the aforesaid period whereby the democratic rights of the citizens including liberty of person, freedom of speech and expression, the right to assemble peacefully, to form associations or Unions were curbed or nullified ;

(ii) to what, if any such curb of democratic rights of citizens took place with the encouragement of or was aided or abetted by any person or persons having official authority or by any other institution or organizations,

(iii) for what purposes and in whose interest and under whose directions of any such curb of democratic rights of citizens took place ;

(b) to consider such other matters which in the opinion of the Commission of Inquiry have any relevance to the aforesaid allegations, and

(c) to suggest steps and measures so that violation of such democratic rights cannot recur in future.

3. On 8.12.77, the respondent No. 2, the Officers' Association, Cholera Research Centre through its President Dr. A. K. Ghosh filed a petition of complaint before the said Commission. In the complaint it is stated that deliberately, ignoring the dangers and risks involved in administering Fanasil to human population and knowing that the knowledge gained by the experimentation would not benefit our population, as they are continuously exposed to infection and reinfection by germs causing cholera, which would necessitate intake of medicine all the year round, the said Dr. S. C. Pal and Dr. B. C. Deb used the Calcutta population as human guinea pigs. They acted in the rash, negligent and irresponsible way akin to criminal offence and thereby violated the biomedical ethics and also the democratic rights of the population to get safe and ethical medication and protection against unnecessary administration of drugs of

known toxic (i. e. dangerous) effects. This is a matter of public importance. The Government of West Bengal, collaborated in this experimentation will be evident from the Annual Report of the Cholera Research Centre, for the year 1974. Thus it appears that this authority was also responsible in the aforesaid experimentation. Dr. C. Gopalan, Director-General, Indian Council and Secretary, Union Ministry of Health, and the Secretary of Health, Government of West Bengal, Writers Buildings supported the said Dr. S. C. Pal and Dr. B. C. Deb in their misuse of power and abuse of authority in administering the said toxic drug "Fanasil" on unsuspecting human population belonging to low socio-economic condition, in Calcutta and thereby are responsible in this matter of public importance. Dr. C. Gopalan and the Secretary, Union Ministry of Health and Secretary, Ministry of Health, Government of West Bengal through negligent and/or irresponsible action and/or inaction-helped the said Dr. S. C. Pal and Dr. B. C. Deb in their misuse of power and/or responsibility and/or abuse of authority in administering the untested and unstandardised vaccine.

4. There is another allegation about curbing and nullifying the democratic rights of Scientific Officers to form an association. It is stated that Dr. C. Gopalan the Director General, Indian Council of Medical Research did not recognise the officers' association which was registered with the Registrar of Firms, Societies and Non-trading Corporation, West Bengal on March 24, 1975 and obtained the certificate of registration No. S/15902 of 1974-75. It is further stated in the complaint that Dr. C. Gopalan, Director General, Indian Council of Medical Research while curbing and nullifying the rights to form the said association did not consult the Governing Body of the Indian Council of Medical Research and acted unilaterally and whimsically by misuse of power and abuse of authority.

5. As a consequence of the filing of the said complaint, the respondent No. 1 the Commission issued summons to the petitioners and respondent No. 3 under Section 8B of the Commission of Inquiry Act. The said parties were directed to appear in person or by a lawyer on 3rd of April, 1978 before the Commission and to state their cases supported by affidavits if they controvert the facts and submit a list of names and addresses of witnesses and produce the documents in support, failing which, the commission may proceed ex parte or may take steps for ensuring their attendance, if necessary. The petitioners filed an affidavit affirming therein that the officers of the Cholera Research Center are not "public servants" as described under Section 21 of the Indian Penal Code. The Council is not a creation of any statute. It is an independent and autonomous body unconnected with the Government authority. It is contended in the said affidavit that the Commission has got no jurisdiction to enquire into the complaint filed by the officers association inasmuch

as the terms of the reference did not confer such jurisdiction upon the Commission. By an order dated 21st of April, 1978 the Commission rejected the preliminary objections raised by the petitioners and decided to proceed the enquiry with respect to the said complaint. The petitioner being aggrieved by the said order of the Commission, moved this Court under Art. 226 of the Constitution and obtained the present Rule on 8th May, 1978.

6. Mr. Deb, appearing on behalf of the petitioners contended that the respondent No. 1 has assumed jurisdiction not vested in him by the terms of reference. It is argued that the term "Public Servant" is well known to law. The Council being not constituted either by any Act nor it is a department of the Central Government, the Officers of the said Council cannot be said to be public servants. Reliance was placed upon a Bench Decision of this Court in the case of (1) *D. G. of Health Services & others v. Bikash Chatterjee and ors.* (AIR 1969 Calcutta 525) and a decision of the Supreme Court in (2) *Sabhajit Tewari v. Union of India and others* (AIR 1975 SC 1329).

7. Mr. Gooptu, appearing on behalf of the respondent No. 2 contends that the activities of the Indian Council of Medical Research are in fact activities of the Government of India and the funds required for its activities are made available by the Government of India, which will appear from the report in 1976-77 of the Ministry of Health. It is further contended that accounts of the Indian Council of Medical Research are audited only by the Comptroller and Auditor General, who is responsible for the receipts and expenditure of the Government. It is submitted that officers of the Council come within 9th Clause read with Explanation 2 of section 21 of the Indian Penal Code.

8. Mr. Chatterji, appearing on behalf of the State Government the respondent No. 4 contends that the definition of "Public Servant" under Section 21 of the Indian Penal Code is neither conclusive nor exhaustive. Certain descriptions of officers have been given in Section 21 and those persons falling under any of those descriptions are regarded as "Public Servant" for the purpose of the offences committed by them. According to Mr. Chatterji any person who does service to the people and community should be regarded as public servant.

9. Mr. Basu, appearing on behalf of Union of India, supports the petitioners and adopts the arguments of Mr. Deb.

10. A distinction has been made between the common people and certain classes of persons in the service and pay of government, or exercising various public functions, and those persons included in the words "Public Servants". There are several offences which can only be committed by public servants. Section 21 of the Indian Penal Code does not define what a public servant means but enumerates the various functionaries who will be designated as public servants. A public servant

is one, who has to discharge some public duty. Clause 9 read with Explanation 2 to Section 21 are not attracted to the present case. According to Explanation 2 the person who in fact discharges the duties of the office which brings him under some of the descriptions of public servant, is for all the purposes of the Code is a public servant whatever legal defect there may be in his right to hold the office. The absence of a formal appointment is immaterial where a person is in actual possession of a situation as a public servant. Clause 9 begins with "every officer", the word "officer" means a holder of some officium or office to whom certain functions of the government are delegated,

11. In (1) *D. G. of Health Service v. Bikash Chatterjee & ors.*, a question arose whether the provision of Art. 311 of the Constitution would apply to the Council of Scientific and Industrial Research which is a society registered under the Societies Registration Act. It has been held by a Division Bench of this Court that the Council being independent and autonomous body nor under any direct control of the Government is neither a public body nor a part of the Government; neither grants in aid of the activities of the Council nor the touch with the Government makes the Council a public body or a part of the Government. Mr. Chatterji drew my attention to paragraph 39 of the decision of the Supreme Court in (3) *Sukhdeb Singh v. Bhagat Ram*, reported in (AIR 1975 SC 1331), wherein it is stated that a public authority is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit.

12. A question arose whether the Council of the Scientific and Industrial Research was really an agency of the Government. The Supreme Court in *Sabhajit Tewari's* case (AIR 1975 SC 1329) negatived the contention and observed that the Council of Scientific and Industrial Research does not have a statutory character like the Oil & Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. If a Society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that the Government appoints nominees to the governing body or the Government may terminate the membership will not establish anything more than the fact that the Government takes special care in promotion, guidance and co-operation of Scientific & Industrial research and other activities of the Council towards the development of industries in the country in a responsible manner.

13. The Indian Council of Medical Research hereinafter referred to as the Council is a Society registered under the Societies Registration Act. The Council, undoubtedly, is an apex organisation for the medical research in the country. The funds required for its activities are

made available by the Central Government and its accounts are audited by the Comptroller and Auditor General of India. But even then, it cannot be regarded as a department of the Central Government and as such the officers of the said Council cannot be regarded as public servants. The words "public servant" have a particular meaning. It is true that the word has not been defined in section 21 of the Indian Penal Code. But unless a person comes within the description as enumerated in various clauses of Section 21 of the Indian Penal Code, that person cannot be said to be a public servant. The dictionary meaning of the public servant is "government servant". But all Govt. Servant are not public servants. The Court cannot extend the definition of public servant and hold that any person who serves the community and the people and carries out transactions for the benefit of the public and not for private profit comes within the description of a public servant. In *Sukhdev Singh's* case the Supreme Court observed that the public authority is a body which has public or statutory duties to perform. In the instant case the Indian Council of Medical Research is neither a public authority nor it has public or statutory duties to perform. So, the officers of the Cholera Research Centre which is one of the Centres under the Indian Council of Medical Research are not public servants. The purpose of constituting the Commission is to inquire and find out the misuse of powers by a public servant by which the democratic rights of the citizen were curbed and nullified. It was required for the purposes of maintaining the probity and purity of public life in the country, as observed by the Supreme Court in (4) *Dalmia's* case, 1959 SCR 279. The Commission of Inquiry is a creature of statute. Under Section 5(2) of the Act the Commission has got the power to require any person to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to the subject matter of the enquiry. But at the same time, the Commission cannot travel beyond the terms of its reference. Now, looking to the terms of reference it appears that clause 2(a) (i) of the Notification refers to misuse of power by public servant. In my opinion, the petitioners except petitioner No. 4 who are the officers of the Council are not public servants and clause 2(a) (i) of the Notification is not attracted and accordingly, the Commission, has got no jurisdiction to inquire into the complaint filed by the officers, association, Cholera Research Centre against the petitioners 1 to 3.

14. It is not disputed that the petitioner No. 4, the Secretary, Ministry of Health, Government of India is an officer of the Government and he is a public servant. In the complaint it is stated that Dr. C. Gopalan, the Secretary, Union Ministry of Health, Government of India and the Secretary, Ministry of Health, Government of West Bengal through negligent and/or irresponsible action and/or inaction helped the said Dr. S. C. Pal and Dr. B. C. Deb in their misuse of power and/or

responsibility and/or abuse of authority in administering untested and unstandardised vaccine.

15. Clause (ii) deals with, "to what, if any such curbe or democratic rights of citizen took place with the encouragement of or was aided or abetted by any person or persons having official authority or by any other institution or organisation".

16. According to Mr. Deb, any such curbe of democratic rights" in clause (ii) refers to curbe of democratic rights by misuse of power by public servants as referred to clause (1).

17. In my opinion, clause (ii) is independent and is not dependent upon clause (i). Clause (i) deals with misuse of power by public servants themselves and clause (II) deals with aiding or abetting by any person or persons having official authority or curbing such democratic rights of citizen. In view of the allegations referred to in the complaint, in my opinion, the Commission has got jurisdiction to inquire into only that part of the allegations with respect to which the petitioner No. 4 and the Secretary, Department of Health, Government of India have aided and abetted the other petitioners in administering Fanasil to human population.

18. It is contended by Mr. Chatterji that under sub-clause (b) the Commission has got jurisdiction to consider such other matters which in the opinion of the Commission of Inquiry have any relevance to the afore-said allegations.

19. Mr. Deb, pointed out that the allegations referred to in sub-clause (b) deals with the allegations either in sub-clauses (i) or (ii).

20. According to Mr. Chatterji the allegations related and referred to such persistence misuse of "authority of power" in the Preamble. It is argued that the ward "authority of power" includes the powers which the petitioners exercise in their official capacity as officers of the Council.

21. In (14) *Rajasthan State Electricity Board v. Mohanlal*, (AIR 1966 SC 1857), the Supreme Court said that an "authority" is a public administrative agency or corporation having quasi governmental powers and authorised to administer a revenue producing public enterprise. The petitioners 1-3 undoubtedly have no such authority. Clause 2(b) deals with the Commission's power to inquire into any other matters which have not been specifically referred to in the Notification, but at the same time, those matters are relevant to the allegations of misuse of power by any authority. So, in my opinion, sub-clause (b) is not attracted to the facts and circumstances of the present case.

22. There is another allegation in the complaint by which Dr. C. Gopalan did not allow the Officers, Association to form an association. That allegation in the complaint does not come within the purview of clause (ii) inasmuch as Dr. C. Gopalan is not a public servant and no

allegations of abatement by any public servant were made in the complaint. Neither the Notification nor the power of the Governor constituting the Commission under Section 3 of the Act has been challenged before me.

23 In the result, the petitioners' preliminary objections before the Commission succeed in part.

This Rule is made absolute in part. Part of the impugned order is quashed by a Writ of Certiorari as indicated hereinafter.

24. Let a Writ of Mandamus be issued commanding the Respondent No. 1 not to inquire into other allegations in the complaint filed by the Officers' Association except those allegations in the complaint by which the aiding or abetting by the petitioner No. 4 and the Secretary to the Government of West Bengal, Department of Health, have been alleged.

There will be no order for costs.

Prayer for stay of operation of the order is refused.

T.K.M.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Salil Kumar Datta

Decision : August 4, 1978

Bhagaban Shaw ... Petitioner
Versus

Sm. Simmi Goyal ... Opposite party*

West Bengal Premises Tenancy Act (12 of 1956), Secs. 17(1), 17(2) & 17(2A)—Liability of tenant to make deposit or payment—Scope of—Enhancement of contractual rent by agreement subject to conditions of repairs by landlord—Repairs partly done by landlord—Rest of repairs done by tenant—Tenant sought for adjustment against enhanced rent—Position in law

In the instant ejectment suit, the defendant petitioner filed an application under sections 17(1), 17(2) and 17(2A) of the West Bengal Premises Tenancy Act, 1956 for relief but the said application was rejected by the trial court. Being aggrieved, the present Rule was obtained by the tenant-defendant.

HELD: If a dispute as to the amount payable is raised by the tenant under sub-section (2), there is no further scope for any steps being taken under the first part of sub-section (1). In making the application under sub-section (2), the tenant is required to deposit or pay the amount admitted by him to be due from him. Under sub-section (2A), clause (a) the court can grant an extension of time for payment of such admitted amount on the

*Civil Rule No. 357 of 1977.

application of the tenant, but it has no further power in law to grant instalments in a case where sub-section (1) of section 17 is attracted.

As the tenant has filed, in the instant case, an application with a prayer under sub-section (2A) also, his failure to deposit admitted arrears at the rate last paid as required under sub-section (2) would not be filed to his application, as on his application under sub-section (2A) filed within the prescribed time the court can extend the time for deposit or payment of any amount referred to therein.

On merits, the learned Munsif has held that the rate of rent is Rs. 50/- per month as agreed to by the parties, to be effective from June 1972, in place of the subsisting rent of Rs. 37/- The tenant under section 4(1)(b), in the instant case, is to pay rent agreed upon by the parties until fair rent is fixed in accordance with law. There seems to be no bar in law in the tenant's voluntarily agreeing to pay higher rent than what was payable under the earlier agreement or over the fair rent. When, however, such enhancement in rent is dependent on the landlord's making effective repairs to the premises as agreed unless such repairs are established to have been made the claim for enhanced rent consequent upon repairs are not acceptable. If any dispute about repairs is raised, it will be for the parties to establish their respective cases in the proceeding under section 17(2) of the Act. The court will come to a finding as to whether the claim for enhanced rent as agreed to by the parties has been established and if so, it will determine the amount payable on the basis of enhanced rent and pass appropriate orders accordingly. If the claim for enhanced rent is, not established, the court will determine the rate of rent at the original rate and give necessary directions for deposit or payment of amount due in terms of sub-section (2) read with sub-section (2A)(a) of section 17 of the Act.

In the instant case, the parties have adduced evidence and the finding of the learned Munsif is to the effect that the defendant had agreed to pay enhanced rent from June 1972 which made him liable to pay the enhanced rent. There was no acceptable evidence before the learned Munsif about the repairs being done by the landlord. It is true that the tenant is not entitled to recover or adjust costs for repairs made by him under section 17(2) without sanction of the Rent Controller except by independent legal proceeding. In the absence of such proof of the repairs by the landlord she cannot be made entitled to claim the enhanced rent in the proceeding under section 17(2).

Case referred to :—

(1) *Kozi Abdul Hossain v. Fozlur Rahman*, 78 CWN 599

Barun Kumar Roy Chowdhury for the Petitioner
Bhaskar Ghosh for the Opposite party

The judgment of the Court was as follows :—

This Rule is directed against order No. 124 dated September 15, 1976 in a suit for recovery of possession of the suit premises, whereby

the application of the defendant under sections 17(1), 17(2) and 17(2A) of the West Bengal Premises Tenancy Act, 1956 was rejected in final disposal thereof.

2. The claim for recovery of possession was made on the ground of default in payment of rent, nuisance, annoyance and also of own use and occupation. According to the plaintiff's case, the rent of the premises was Rs. 37/- per month according to the English calendar month. At the request of the defendant the plaintiff agreed to make thorough repairs to the premises within May 1972 and the defendant agreed to pay rent at the rate of Rs. 50/- per month with effect from March, 1972. The repairs were made by the plaintiff but the defendant while paying the rent at the enhanced rate of Rs. 50/- on May 14, 1972 took the position that the enhanced rate of rent would be effective from June, 1972. The defendant defaulted in payment of rent at the rate of Rs. 50/- last paid by him from June 1972 to May 1973.

3. The defendant's case was a denial of all allegations of default, annoyance, nuisance or own requirement. The plaintiff it was said, under the pretext of repairs demolished southern and eastern walls of the premises and thereafter suddenly stopped further work in August 1972 and requesting the defendant to continue the work on account of her financial stringency. The defendant completed the repair work at a cost of Rs. 838.88 P but the plaintiff declined to adjust against rent the costs so incurred by the defendant and was claiming enhanced rent which she was not entitled to do in absence of repairs agreed to be made by her. It was also said that rent for March to June 1972 was paid at the old rate but the plaintiff's husband tempered the receipt to Rs. 150/-.

4. Immediately after his appearance in the suit the defendant filed an application under Section 17(1), 17(2) read with Section 17(2A) disputing the rate of rent and period of defaults and praying for permission to deposit rent at the old rate and for extension of time to deposit arrears, if any, by instalments. The defendant's further case was that the enhanced rent could be effective only if the repair had been made by the plaintiff, which was not done. Further the defendant was entitled to adjustment of the costs incurred by him at the request of the landlady for repairs against rent at the usual rate. The plaintiff filed objection reiterating her claim for enhanced rents, which was, according to her case, in fact paid by the defendant for March to May, 1972 as the repairs were done by her within May, 1972.

5. The learned Munsif found that the defendant admittedly was in arrear of rent from June 1972 to May 1973 for twelve months at the rate last paid while he had been depositing rent from June 1973 at the rate of Rs. 37/- per month. Relying on the decision in (1) *Kazi Abdul Hossain v. Fazlur Rahman*, 78 CWN 599, the learned Munsif was of opinion that in

absence of deposit of the admitted arrear rent, the application was not maintainable in law.

6. Even so the learned Munsif proceeded to determine the rate of rent in the context of the dispute raised by the defendant. It was found on the basis of an endorsement in the rent counter-foil that the defendant had agreed to the enhanced rate of rent at the rate of Rs. 50/- per month from June 1972. On the evidence adduced the learned Munsif in effect held that the landlord's case of repairs as having made by her was not established while the defendant was not entitled to the credit for the amount spent by him for repairs undertaken voluntarily at his risk and not on the order of the Rent Controller, though the defendant might be entitled to recover such costs by suit. Though the defendant was otherwise liable to pay arrear rent at Rs. 50/- per month from June 1972 to March 1973 and balance at the rate of Rs. 13/- per month from June 1973 along with statutory interest with $8\frac{1}{2}$ % statutory interest, no direction could be made for necessary deposit as the application itself was held to be not maintainable in absence of deposit of admitted rent.

7. Before we proceed to examine the findings of the learned Munsif it must be said that in view of the conclusion arrived at by him about the non-maintainability of the application, it was not necessary for him to embark on the investigation about the rate of rent and the question of arrears. Since the learned Munsif had come to a conclusion about the rate of rent and arrears, which has a bearing on the decision of the suit, it is necessary for us to examine if the application was maintainable in law and further if the other findings are sustainable. Sub-section (2) of Section 17 provides that if there is a dispute about the amount of rent payable by the tenant, he shall within time specified in sub-section (1), deposit in court the amount admitted by him to be due from him together with an application for determination of rent payable. There can be little dispute that under the aforesaid provisions if sub-section (2A) was not there, unless such deposit of admitted amount is made, the application under Sub-section (2) will not be maintainable.

Sub-section (2A) is as follows :

“(2A). Notwithstanding anything contained in Sub-section (1) or Sub-section (2), on the application of the tenant, the Court may, by order, (a) extend the time specified in Sub-section (1) or Sub-section (2) for the deposit or payment of any amount referred to therein ; (b) having regard to the circumstances of the tenant as also of the landlord and the total sum inclusive of interest required to be deposited or paid under sub-section (1) on account of default in the payment of rent, permit the tenant to deposit or pay such instalments and by such dates as the Court may fix.”

Section 17 (1) provides for deposit or payment of rent, if there is any default, upto the month previous to deposit or payment within thirty days

of service of summons or appearance, together with interest as specified. The amount so payable or to be deposited is to be calculated at the rate of rent last paid. The provision further provides for continuation of the payment or deposit of rent at that rate month by month the 15th of each succeeding month obviously during the pendency of the suit. The time for such deposit specified in Sub-section (1) may be extended, if an application is made under Sub-section (2A), Clause (a) and even, the Court under Clause (b) may permit deposit or payment of the amount defaulted upto the month previous to the order with interest by suitable instalments as the Court, having regard to the circumstances, may fix for the purpose.

8. If however a dispute as to the amount payable is raised by the tenant under Sub-section (2), there is no further scope for any steps being taken under Sub-section (1), so that the provisions noted above will have no application. In making the application under Sub-section (2), the tenant is required to deposit or pay the amount admitted by him to be due from him under Sub-section (2A), clause (a) the court can grant an extension of time for payment of such admitted amount on the application of the tenant, but it has no further power in law to grant instalments as in a case where sub-section (1) of section 17 is attracted.

9. In view of this situation as the tenant had filed an application with prayer under Sub-section (2A) also, his failure to deposit admitted arrears at the rate last paid as required under sub-section (2) would not be fatal to his application, as on his application under Sub-section (2A) filed within time the Court can extend the time for deposit or payment of any amount referred to therein. The learned Munsif thus committed an error in exercise of his jurisdiction in holding that the application in the circumstances was not maintainable.

10. On merit, the learned Munsif has held that the rate of rent is Rs. 50/- per month as agreed to by the parties, to be effective from June 1972, in place of the subsisting rent of Rs. 37/-. The tenant under section 4 (1)(b), in the instant case, is to pay rent agreed upon by the parties until fair rent is fixed in accordance with law. There seems to be no bar in law in the tenant's voluntarily agreeing to pay higher rent than what was payable under the earlier agreement or over the fair rent. When however such enhancement in rent is dependent on the landlord's making effective repairs to the premises as agreed unless such repairs are established to have been made the claim for enhanced rent consequent on repair is not acceptable. If any dispute about the repairs is raised, it will be for the parties to establish their respective cases in proceedings under section 17(2) of the Act. The Court will have to come to the finding as to whether the claim for enhanced rent as agreed to by the parties has been established and if so, it will determine the amount payable on the basis of enhanced rent and pass appropriate orders accordingly. If the claim for enhanced rent is not established, the court will

determine the rate of rent at the original rate and give necessary directions for deposit or payment of amount due in terms of Sub-section (2) read with Sub-section (2A) (a).

11. In the instant case, the parties have adduced evidence and the finding of the learned Munsif is to the effect that the defendant agreed to pay enhanced rent from June 1972 which made him liable to pay the enhanced rent. There was no acceptable evidence before the learned Munsif about the repairs being done by the landlord. It is true that the tenant is not entitled to recover or adjust repair costs made by him under Section 17(2) without sanction of the Rent Controller except by independent legal proceeding. In absence of such proof of repairs by the landlord she cannot be made entitled to claim the enhanced rent in proceedings under Section 17(2).

12. In view of the above position, the Rule is made absolute and impugned order is set aside. The learned Munsif will dispose of the application filed by the defendant under section 17(2) read with Section 17(2A) (a) in accordance with law in the light of the observations made herein on the basis of rent at the rate of Rs. 37/- per month, fixing a time payment of the amount so found due with statutory interest therein on adjustment of any amount deposited by the tenant.

13. There will be no order for costs and let the records be sent down immediately.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Sankar Prasad Mitra, Chief Justice and Mr. Justice
Salil Kumar Datta

Decision : June 8, 1978

Motilal Kala & Anr.

..

...

...Appellants

Versus

Hari Govind Rai & Ors.

...

...Respondents*

West Bengal Board of Secondary Education (Manner of Hearing and Deciding Appeals by Appeal Committee) Regulations 1964—Regulation 9(1)(b)(ii)—Reinstatement—Construction of provisions under—When dismissal is held to be wrongful, automatic reinstatement should not be made without considering the interests of school—Gratuity as an alternative remedy—Speaking Order should be made.

The managing committee of a school dismissed an assistant teacher of the school from service. The aggrieved teacher preferred an appeal to the Appeal Committee of the West Bengal Board of Secondary

*F. M. A. no. 260 of 1977.

Education. The Appeal Committee held that his dismissal was wrongful. And the Appeal Committee directed the managing committee of the school to pay gratuity to him in lieu of reinstatement. Being aggrieved the teacher moved a writ petition for writs in the nature of Mandamus and Certiorari for quashing the Appeal Committee's order and obtained a Rule. His case was that the Appeal Committee should have made an order of reinstatement. The learned trial Judge quashed the Appeal Committee's order on the view that the relationship between a teacher and the managing committee of the school is not a relevant fact which can be taken into consideration in applying Regulation 9(1)(b)(ii) of the 1964 Regulations and directed the Appeal Committee to act in accordance with law. Hence the appeal.

HELD: The Appeal Committee cannot order reinstatement unless it thinks that reinstatement is proper and appropriate and has to give reasons for doing so. In the context of the provisions like Regulation 9(1)(b) the interests of the school cannot be ignored. And if the Appeal Committee considers that the interests of the school would suffer by an order of reinstatement the Appeal Committee is at liberty to chose the second alternative of making an order for payment of gratuity. In other words, the Appeal Committee, once it decides upon allowing the appeal, cannot pass an automatic order of reinstatement.

The principle of smooth and harmonious working of an industrial establishment which the Supreme Court invoked in several reported cases applies with equal, if not greater force to an educational institution. The manner in which Regulation 9(1)(b) has been drafted fully supports this view. In directing reinstatement of a teacher, therefore, the interest of the educational institution cannot be ignored which is essentially a relevant factor.

Cases referred to :—

- (1) *Assam Oil Co. Ltd. v. Its workmen*, AIR 1964 SC 1264
- (2) *M/s. Ruby General Insurance Co. Ltd. v. P. P. Chopra*, 1969 (3) SCC 653
- (3) *Management of Panitola Tea Estate v. The Workmen*, 1971 LIC 1235
- (4) *M/s. Hindusthan Steel Ltd. v. A. K. Roy*, AIR 1970 SC 1041

Sankar Ghosh and B. L. Jain ... for the appellants
B. C. Dutt and R. C. Ram ... for the respondents

The judgment of the Court was as follows :—

Mitra, C. J. :—In this appeal from a judgment of Deb, J. delivered on November 5, 1976 on an application under Article 226 of the Constitution, we are called upon to construe the relevant provisions of Rule 9(1)(b)(ii) of the West Bengal Board of Secondary Education (Manner of Hearing and Deciding Appeals by Appeal Committee) Regulations, 1964.

2. The respondent Hari Govind Rai was an assistant teacher of Digamber Jain Vidyalaya. The managing committee of the Vidyalaya dismissed him from service. He filed an appeal to the Appeal Committee constituted under S. 22 of the West Bengal Board of Secondary Education Act, 1963. The Appeal Committee held that his dismissal was wrongful. The Appeal Committee directed the managing committee to pay gratuity to him in lieu of re-instatement.

3. The respondent was aggrieved by the Appeal Committee's decision. He made an application to this Court under Article 226 of the Constitution for writs in the nature of mandamus and certiorari for quashing the Appeal Committee's order. His case is that the Appeal Committee should have made an order for reinstatement.

4. Let us read the relevant provisions of Rule 9 of the Appeal Regulations. These provisions are as follows :

"Rule 9(1). The Appeal Committee may, on consideration of all the materials before it—

...
(b) in an appeal against an order of discharge or dismissal,—

(i) allow the appeal and make an order directing reinstatement of the appellant with or without such relief as may be found consequential to such reinstatement, if it is of the opinion that such reinstatement, is appropriate and proper, or

(ii) allow the appeal and make an order directing payment or gratuity to the appellant calculated at the rate of one month's salary for each completed year of service subject to a maximum of twelve months' salary if it is of the opinion that such payment of gratuity would be appropriate relief to the appellant instead of making an order of reinstatement, or

(iii) dismiss the appeal, if it is of the opinion that there are no good grounds for interference with the order appealed against.

(2) The Appeal Committee in all cases shall record reasons for its decision."

5. From the above provisions, it appears that when an appeal is preferred to the Appeal Committee, the committee has three alternatives. The first alternative is to allow the appeal and make an order directing reinstatement with or without consequential relief if the Appeal Committee is of opinion that such reinstatement is (a) appropriate and (b) proper. The second alternative is to allow the appeal and make an order directing payment of gratuity up to a maximum of 12 months' salary if the Appeal Committee is of opinion that such payment of gratuity would be appropriate relief to the appellant instead of making an order for reinstatement. The third alternative is to dismiss the appeal when there are no grounds for interference with the order of dismissal. The Appeal Committee is

enjoined to take into consideration all relevant materials placed before it and record its reasons for its decision.

6. It seems to us that when the Appeal Committee is inclined to allow the appeal it has first to direct its mind on the basis of the materials placed before it to the relief of reinstatement. If reinstatement is proper and appropriate on the facts and in the circumstances of the case, the Appeal Committee is not required at all to think of the second alternative. If, however, the Appeal Committee finds from the materials available to it that reinstatement would not be proper and appropriate the Appeal Committee has jurisdiction under the law to pass an order for payment of gratuity. But the two alternatives are to be considered in the order in which they have been provided for in Rule 9(1)(b). Only if the Appeal Committee is of opinion that an order of re-instatement would not be proper and appropriate, the Appeal Committee resorts to the second alternative of payment of gratuity.

7. In the instant case, the Appeal Committee allowed the appeal. It was of opinion that the order of dismissal was bad because the rules of procedure for making the order had not been duly observed. The Appeal Committee while allowing the appeal has chosen the second alternative above mentioned and has given its reasons for doing so. The Appeal Committee has said :

“Thus the termination of the services of the appellant was not justified. It was admitted during hearing and it also appears from the papers that the relationship between the appellant (i. e. Hari Govind Rai) and the principal and also the relationship between the appellant and managing committee is not happy. The suspicion of the respondent i. e. the Vidyalaya is that the appellant (i. e. Hari Govind Rai) wrote certain letters to the Director of Public Instruction making certain allegations against the school. It is also alleged that the appellant (i. e. Hari Govind Rai) encouraged indiscipline in the School. In the circumstances, in the interest of the school the appellant (i.e., Hari Govind Rai) should not be allowed to join the school but as his termination was not proper he should be given gratuity in lieu of reinstatement as provided in the existing regulations. The appellant (i. e. Hari Govind Rai) claims arrears of salaries and allowances from the respondent i.e., the Vidyalaya. He is entitled to get them from the school. Hence ordered that the appeal is allowed, the prayer for reinstatement is rejected. The appellant shall get from the school gratuity calculated at the rate of one month's pay for each completed year of service. He shall also get from the school his arrears of salaries, if any, and admissible allowances from the school within a period of two months from the date of receipt of this order by the school”.

8. The learned trial Judge has taken the view that the relationship

between a teacher and the management of the school is not a relevant fact which can be taken under consideration in applying Rule 9(1) (b) of the said Regulations. The learned Judge has quashed the impugned order of the Appeal Committee and has made the rule absolute with the direction to the Appeal Committee to act in accordance with law.

9. Mr. B.C. Dutt, learned counsel for the respondent, has urged before us that an unhappy relationship between a teacher and the Managing Committee of the school is not a circumstances which justifies the decision that reinstatement is not proper and appropriate. Clauses (i) and (ii) of Rule 9(1) (b), Mr. Dutt contends, have to be read together and unless the first clause is inapplicable the second clause does not come into operation at all. In the instant case, Mr. Dutt submits, the relationship between the teacher and the Managing Committee is not at all relevant for holding that the first clause is inapplicable.

10. In our view the arguments of Mr. Dutt cannot be sustained. Rule 9(1) (b) requires that the Appeal Committee must consider all materials before it. We cannot say that materials relating to unhappy or unsatisfactory relationship between the teacher and the management is not a relevant factor to be taken into consideration by the Appeal Committee. The Appeal Committee on materials before it must be satisfied that an order of reinstatement is proper and appropriate. The Appeal Committee, once it decides upon allowing the appeal, cannot pass an automatic order of reinstatement.

11. In the instant case the Appeal Committee has found that in the interests of the school an order of reinstatement should not be made. It was admitted before the Appeal Committee both by the teacher and by the management that the teacher's relationship with the management was unsatisfactory. This finding of fact has not been and cannot be challenged before us. All that is being said is that this finding is irrelevant for purposes of rule 9(1) (b). We have already said that the Appeal Committee cannot order reinstatement unless it thinks that reinstatement is proper and appropriate and has to give its reasons for doing so. In the context of provisions like this the interests of the school cannot be ignored. And if the Appeal Committee considers that the interests of the school would suffer by an order of reinstatement the Appeal Committee is at liberty to choose the second alternative and make an order for payment of gratuity. We do not find any error on the face of the records made by the Appeal Committee which enables us to interfere with its order by issuing appropriate writs.

12. In this connection it may be relevant to refer to a few Supreme Court decisions in the context of the industrial law on reinstatement. In (1) *Assam Oil Co. Ltd., New Delhi v. Its Workmen*, AIR 1964 SC 1264 it has been observed that there is no doubt that the normal rule is that

in cases of wrongful dismissal the employee is entitled to reinstatement ; but there can be cases where it would not be expedient to follow this normal rule and to direct reinstatement. Thus, where the dismissed employee occupied a position to some confidence with her employer, and the employer states that he had lost confidence in her was dissatisfied with her work, it would not be, in the circumstances of the case, fair either to the employer or to the employee to direct reinstatement and compensation might be the proper relief.

13. In our opinion, the principles indicated in the *Assam Oil Co's* case fit in with the arrangement and language of rule 9(1) (b) in the instant case. Whenever the Appeal Committee feels that an appeal should be allowed the normal rule is to direct reinstatement provided that the Appeal Committee thinks that reinstatement is proper and appropriate. Where the Appeal Committee finds that the employer has lost confidence in the employee or that the relationship between the employer and the employee is such that the interests of the institution would not be served by an order of reinstatement the Appeal Committee has jurisdiction to pass an order for payment of gratuity instead of reinstatement.

14. Mr. B.C. Dutt has expressed an apprehension that if we hold that reinstatement might not be ordered when the relationship between a teacher and the management is unhappy then in no case would the Appeal Committee be inclined to pass an order for reinstatement. In our view the apprehension of Mr. Dutt is unfounded. The Appeal Committee must be convinced that there are good grounds for holding that the relationship between the teacher and the management is unsatisfactory. Without adequate and positive evidence of such relationship the Appeal Committee cannot choose the second alternative. In the instant case it was admitted that the relationship was bad both between the teacher and the Principal and between the teacher and the management. On these admitted facts and upon consideration of documents on record the Appeal Committee has passed this order for payment of gratuity. That is why we are not interfering with the order.

15. The next case of the Supreme Court we want to refer to is the case of (2) *M/s. Ruby General Insurance Co. Ltd. v. P. P. Chopra*, reported in 1969 (3) SCC 653. The respondent was a stenographer of the appellant in its branch office at Delhi. He was appointed on July 18, 1966 but no formal letter of appointment was issued to him. He was asked, however, to fill in a proforma which contained certain terms and conditions of service. On the respondent's insistence on the issue of an appointment letter, the appellant informed him that his appointment was that of a probationer for a period of one year. Meanwhile the respondent also approached the Labour Commissioner for directing the appellant to issue the letter of appointment. The appellant, when required by the

Labour Commissioner, issued the letter of appointment but terminated the respondent's services on July 17, 1967. The respondent, thereafter, moved the Central Government who referred the matter to the Tribunal. The Tribunal directed reinstatement holding that the termination of the respondent's services was not termination simpliciter but was dismissal and as such liable to be set aside because the same was passed without holding any enquiry. The appellant preferred an appeal to the Supreme Court. The Supreme Court has held :

"(i) that the normal rule is that in case of invalid orders of dismissal, industrial adjudication would direct reinstatement of a dismissed employee. Nevertheless, there would be cases where it would not be expedient to adopt such a course : and

(ii) the reinstatement in the present case which the Tribunal had directed was inexpedient for the respondent had served the company only for 12 months. No one induced him to give up service. The company's establishment was small. The respondent, as a stenographer in whom trust could be placed did not inspire confidence in the Regional Manager. The Tribunal erred in reinstating him. It should have awarded him only compensation."

16. Here is also another case in which although the order of dismissal was held to be bad, reinstatement was not considered to be proper or appropriate inasmuch as the respondent did not inspire confidence in the appellant's Regional Manager. The confidence of the employee or the relationship with the employer is, therefore, a relevant consideration for determining whether an order of reinstatement in a particular case is proper and appropriate.

17. Mr. Sankar Ghose, learned counsel for the appellant, placed strong reliance on the above two decisions of the Supreme Court. There is another judgment of the Supreme Court on which the respondent's counsel relied but that judgment appears to us to be against the respondent. It is the judgment in the case of the (3) *Management of Panitola Tea Estate v. The Workmen*, reported in 1971 LIC at page 1235. At page 1238 the Supreme Court has given some indications as to matters relevant for a decision that an order for reinstatement is called for. The Supreme Court has said :

"The question whether on setting aside the wrongful dismissal of a workman he should be reinstated or directed to be paid compensation is a matter within the judicial discretion of the Labour Court or the Tribunal dealing with the industrial disputes, the general rule in the absence of any special circumstance being of reinstatement. In exercising this discretion, fairplay towards the employee on the one hand and the interest of the employer, including considerations of discipline in the establishment, on the other, require to be duly safeguarded. This is necessary in the interest both of security of tenure of the employee and of smooth and harmonious working of the establishment.

Legitimate interests of both of them have to be kept in view if the order is expected to promote the desired objective of industrial peace and maximum possible production. The past record of the employee, the nature of the alleged conduct for which action was taken against him, the grounds on which the order of the employer is set aside, the nature of the duties performed by the employee concerned and the nature of the industrial establishment are some of the broad relevant factors which require to be taken into consideration. The factors just stated are merely illustrative and it is not possible to exhaustively enumerate them. Each case has to be decided on its own facts and no hard and fast rule can be laid down to cover generally all conceivable contingencies. Proper balance has to be maintained between the conflicting claims of the employer and the employee without jeopardising the larger interest of industrial peace and progress".

18. In this case the Supreme Court has placed reliance on its earlier decision in the case of (4) *M/s. Hindusthan Steel Ltd., Rourkella v. A. K. Roy & Ors*, AIR 1970 SC 1041. In paragraph 10 at page 1404 it has been stated :

"As exceptions to the general rule of reinstatement, there had been cases where reinstatement has not been considered as either desirable or expedient. These were the cases where there had been strained relations between the employer and the employee ; where the post held by the aggrieved employee had been one of trust and confidence and where though dismissal or discharge was unsustainable owing to some infirmity in the impugned order, the employee was found to have been guilty of an activity subversive of or prejudicial to the interest of the industry"

19. The principle of smooth and harmonious working of an industrial establishment which the Supreme Court invoked in the last two cited cases applies, in our view, with equal if not greater force to an educational institution. The manner in which Rule 9(1)(b) has been drafted fully supports this view of ours. In directing reinstatement of a teacher, therefore, the interest of the institution cannot be ignored which is essentially a relevant factor. In the instant case as we have repeatedly stated that it was admitted before the Appeal Committee by both the parties that the relationship between the teacher and the principal as well as between the teacher and the committee of management was strained. That relationship was also discovered by the Appeal Committee from the papers placed before it. In these circumstances, the Appeal Committee was, in our opinion, justified in applying Rule 9(1)(b)(ii) to the facts and circumstances of the case.

20. This appeal is therefore allowed. The judgment and order under appeal are set aside. The rule is discharged. Interim orders, if any, are vacated.

There will be no order as to costs.

Datta, J. :— I agree.

T. K. M.

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[CRIMINAL REVISIONAL JURISDICTION]

Before Mr. Justice Sudhendra Mohan Guha

Decision : July 7, 1978

Bata Krishna Manna & Anr. Petitioners

Versus

Md. Majit Ali & Ors. Opposite Parties*

Receiver appointed by Magistrate under S. 146 Criminal Procedure Code—Whether Magistrate bound to accept the accounts submitted by Receiver.

HELD : Where on attachment of subject of dispute under S. 146 of Criminal Procedure Code, the Magistrate appoints receivers, the Magistrate is not bound to accept the accounts submitted by the receivers. Magistrate has jurisdiction to enquire into such accounts and make appropriate orders on such enquiry.

Case referred to :—

(1) *Baqridi & Ors. v. Indra Vir Singh & Ors.*, 1968 Cr. LJ 1531 (2)*Dhrubajyoti Ghosh* for the petitioners*Hafizur Rahaman* for the Opposite parties*Biren Mitra and Asit Kumar Goswami* for the State

The judgment of the Court was as follows :—

A very short point namely whether the Magistrate has jurisdiction to interfere with the accounts submitted by the Receiver appointed under section 146 of the Criminal Procedure Code crops up for determination in the instant revision.

2. On November 28, 1975 at the instance of the 1st party/opposite parties nos. 1 to 3 the Sub-Divisional Magistrate, Barasat drew up three proceedings and attached the lands in dispute and appointed the present petitioners as joint Receivers of the attached disputed properties. On December 22, 1975 the petitioners submitted an account before the learned Magistrate showing the expenses for harvesting, thrashing, and storing etc. and prayed for realisation of the same. On January 6, 1976 on the basis of an application by the 1st party/opposite parties nos. 1 to 3 under section 145(5) of the Code of Criminal Procedure, 1973 the Sub-Divisional Magistrate was pleased to cancel the said proceedings and to find them in possession of the property in dispute; and the learned Magistrate also directed the petitioners to deliver possession of the aforesaid lands and harvested paddy etc. to the 1st Party/opposite parties Nos. 1 to 3 on payment of the reasonable cost of harvesting and storing incurred by them.

3. After taking delivery of possessions the opposite parties nos. 1 to 3 made an application before the learned Magistrate questioning the accounts submitted by the joint Receivers and prayed for assessment of the cost of harvesting etc. The learned Magistrate, however, directed the

*Criminal Revision No. 2125 of 1977.

Junior Land Reforms Officer, Amdanga to hold an enquiry regarding the allegation. On receipt of notice from the learned Magistrate the petitioners appeared on March 3, 1976 and filed an objection. The petitioners also disputed the report dated February 2, 1976 submitted by the Junior Land Reforms Officer, Amdanga.

4. On March 25, 1976 the learned Magistrate directed the petitioners to deliver the paddy and straw harvested and stored by them to the 1st party/opposite parties nos. 1 to 3 in presence of the Junior Land Reforms Officer, Amdanga and the learned Magistrate also directed the Junior Land Reforms Officer to hold a fresh enquiry regarding the yield of the paddy and straw from the disputed land and the expenses incurred thereof. On September 15, 1976 the Junior Land Reforms Officer submitted his report but on August 31, 1976 the petitioners further submitted an account relying on the previous account submitted by them. By an order dated 12th September, 1977 the learned Magistrate allowed the petition of the opposite parties and directed the Receivers to take payment of the produce in kind. Half of the demand was admissible. It is against this order the Receivers have come up in revision.

5. It is contended that the Code of Criminal Procedure 1973 does not provide for the enquiry against the Receivers. It is further contended that the learned Magistrate acted illegally and in violation of the principles of natural justice in relying solely on the report of the Junior Land Reforms Officer. Lastly, it is contended that the order dated September 12, 1977 is void ab initio inasmuch as the same was passed beyond the jurisdiction of the learned Magistrate and as such the same is liable to be set aside. It is pointed out that the learned Magistrate ought to have referred the 1st party/opposite parties to a competent Civil Court for deciding the matter.

6. The learned Advocate for the petitioners refers to the decision of Allahabad High Court in (1) *Baqridi and others v. Indra Vir Singh and others* reported in 1968 Cr. L.J. 1531 (2). In this case, in a proceeding under section 145 the learned Magistrate directed Supurdar to deposit certain amount towards profits utilised by him, arising out of attached land. It was held that there is no provision in the Code of Criminal Procedure under which the Magistrate can take steps for the recovery of any amount from the Supurdar. The recovery could be made through the Civil Court. It is further held that in a summary proceeding, it is not possible for the Magistrate to determine what amount was actually recoverable from the Supurdar. So the proper forum for claiming the amount by accounting was the Civil Court.

7. The present petitioners were appointed Receivers under section 146(2) of the Code of Criminal Procedure, 1973 by the learned Magistrate. Undisputedly no Receiver in relation to such subject of dispute had been appointed by any Civil Court. So the Receiver appointed under section

146(2) of the Criminal Procedure Code, would have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure 1908 (5 of 1908). It is also not the case of either party that a receiver had been subsequently appointed in relation to the subject of dispute by any Civil Court. Under Clause (b) to the proviso to the section 146(2) the Magistrate may make such other incidental or consequential orders as may be just. So, till the hearing before the Civil Court, the Magistrate retains the power of management. Under Order XL Rule 3 of the Civil Procedure Code a receiver is to submit his accounts at such periods and in such form as the court directs. He is also to pay the amount due from him. Thus, under section 146 (2) of the Criminal Procedure Code, the receiver appointed by the Magistrate would also be liable to submit his account and pay the amount due from him as the Magistrate may direct. Under the present Criminal Procedure Code there is no scope for referring such matter namely settlement of account to the Civil Court. The Magistrate himself is competent enough to look into the account, submitted by the receiver and pass necessary order directing the receiver for payment of any amount due from him. The learned Advocate refers to the case which came under the Criminal Procedure Code of 1955. The amendment of 1955 introduced a novel scheme by which besides attaching the property in dispute, the Magistrate had to draw up a statement of the facts of the case and to forward the record of the proceedings to a competent Civil Court for determination of issue of possession directing the parties to appear before the Civil Court on a date to be fixed by him. Both sub-sections 1 and 2 to section 146 have been amended under the Code of Criminal Procedure, 1973 and old sub-sections prior to the amendment of 1955 have been substituted. Thus, the decision referred to by the learned Advocate for the petitioner has absolutely no application. Of course the parties themselves can go to the Civil Court for appointment of a receiver. But as stated earlier, under the present law the Magistrate has no jurisdiction to refer to the Civil Court any matter relating to the receiver appointed by him. Thus, in this case the learned Magistrate appears to have acted fully within his jurisdiction. No exception can also be taken to the fact that he had taken the help of an officer subordinate to him for making an enquiry regarding the dispute as to accounts. There cannot be also any bar in acting on such report.

8. In the premises there is no substance in this application for revision which must fail.

9. The Rule is accordingly discharged.

S.P.T.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Sudhamoy Basu

Decision : April 4, 1978

Fatik Lal Pal & Ors. Petitioners

Versus

Sudhir Das Opposite party*

Easement—Right of way—Whether it is necessary to be contiguous to the dominant tenement—English law and Principles underlying Indian Easement Act 1882 discussed.

It is true that easement is an accessory to a tenement and it is not possible to have easement or right in gross. It is quite true that without there being a dominant tenement in existence it is not possible to have easement. Legal easement must enure to the benefit of the dominant tenement. But at the same time it is difficult to sustain the contention that the easement with regard to the right of way must be contiguous to the dominant tenement.

There is no manner of doubt on the basis of the English authorities that contiguity of tenement is not essential for the purpose of an easement over a right of way. It may be noted that the Indian Easement Act 1882 does not in terms apply to the State of West Bengal. Nonetheless, the principles underlying the provisions of the Act have been held to be applicable. The principles of English Law do not seem to be in conflict either with the principles of justice, equity and good conscience or to the principles embodied in the Indian Easement Act.

Cases referred to :—

- (1) *Ackroyd v. Smith* 138 ER 68
- (2) *Thrope v. Brumfitt*, 1873 (8) Ch. App. 650
- (3) *Todrick v. Western National Omnibus Co. Ltd.*, 1934 Ch. 561 : 1934 All ER 25

S. C. Mitter and S. P. Roy Chowdhury for the Petitioners
Hari Narayan Mukherjee for the Opposite party

The judgment of the Court was as follows :—

This Rule relates to a Judgment and order, dated February 19, 1974, passed in Misc. Appeal No. 727 of 1973 by the Additional District Judge, Alipore, reversing an order, dated September 3, 1973 passed by the 6th. Court of Munsiff, Alipore, in Title Suit No. 451 of 1972. The aforesaid order arose out of the plaintiff's petition under Section 39 Rule 1 and the defendants' petition under Section 151 of the Code of Civil Procedure for removal of a wall on a passage which was the subject matter of the suit.

2. The proceeding arises out of Title suit No. 451 of 1972 which was filed by the plaintiff for declaration of title and permanent injunction

*Civil Rule no. 1037 of 1974.

restraining the defendants from interfering with the peaceful possession of the suit property and from forcing a pathway over it. It was alleged in the plaint that a strip of land ran from the east to west measuring $4\frac{1}{2}$ in breadth and 88' ft. in length curved out of C. S. Dag Nos. 518 and 519 of Mouza Akra Krishnanagar, P. S. Mahestola, District 24 Parganas. It is a private passage according to the plaintiffs exclusively belonging to the plaintiffs and was used by them for the purpose of effecting repairs of their properties as also for passage of rain water. Defendants did not have any right over the strip of land at any time. On November 30, 1972, however, the defendants threatened to force a pathway through the suit property by breaking some portion of wall standing on the said passage. Plaintiffs, therefore, claimed the aforesaid declaration and injunction. Defendants in their written statement contended that they were owners of C. S. Plot No. 524 and the disputed land was a common passage for ingress and egress to their aforesaid plot of land where their homestead is situated. On the West of the common passage is Akra Krishnanagar Road and on its east is the dwelling house of the defendants in plot No. 524. The defendants' case is that they had been using the disputed strip of land for more than 50 years. Defendants' further case is that besides the disputed strip of land there was no other way for ingress and egress to the plot No. 524. It will be noticed from the allegations that while the plaintiffs contend that the suit passage is from west to east, it does not continue further east upto C.S. Plot No. 524 which belongs to the defendants. According to the plaintiffs, after the passage lies a graveyard which also belongs to plot 519. Defendants, however, assert that the passage continues right upto plot No. 524 and is contiguous to the same.

3. The present proceeding arose out of plaintiffs' petition under order 39 Rule 1 and the defendants' petition under section 151 of the Code of Civil Procedure for removal of a wall on the said passage, Learned Munsiff on a consideration of the materials on record which includes a report by the Commissioner submitted on March 26, 1973, found that the plaintiffs failed to prove *prima facie* that they had any case to go to the trial and the *ex parte* interim order of injunction which was earlier passed by the learned Munsiff was vacated. Not only that, in order to make the order effective, the learned Munsiff, on the application under Section 151 of the Code of Civil Procedure filed by the defendants ordered the plaintiffs to remove the wall placed on the suit passage within one month from date.

4. In appeal the learned Additional District Judge of Alipore did not dispute the finding of facts by the learned Munsiff. He noted the evidence and other materials on record and directed the parties to maintain status quo and not to change the character of the suit land till the

hearing of the suit. Thus he did not interfere with the order of injunction passed by the learned Munsiff. At the same time, he felt that "a mandatory ad interim injunction can be thrust upon in a case of breach of contract." According to him, learned Munsiff was not justified in granting the mandatory injunction as it was not the case of the defendants that there was a contract with regard to the passage which the plaintiffs violated. In that view of the matter the M.sc. Appeal was allowed on contest and the learned Munsiff's decision was set aside. The said order of the learned Additional District Judge is challenged in this Rule.

5. Mr. Mitter, learned Advocate appearing in support of the Rule, firstly contended that the learned Appellate Court was clearly wrong in holding that a mandatory injunction can be granted only in case of contractual obligation. Mandatory injunction is dealt with under section 39 of the Specific Relief Act, 1963. It runs as follows :

"When, to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

The learned appellate court, as has been noticed earlier, confined "breach of an obligation" to 'a breach of a contractual obligation.' But section 2 sub-section (a) of the Specific Relief Act, 1963 itself states that 'obligation' includes every duty enforceable by law. In that view of the matter, it would be hardly legitimate to confine an 'obligation' merely to a contractual one. The definition clause itself stands in the way of putting such a circumscribed and narrow construction as is sought to be made in the impugned order. I, therefore, find substance in the contention of Mr. Mitter in this regard.

6. Mr. Mukherjee, learned Advocate, appearing to oppose the Rule, however, contended that in terms of the map annexed to the plaint the passage does not run upto CS Plot No. 524 of which the defendants are the owners. In other words, he contended on the basis of the aforesaid map and the pleadings in the plaint that the passage not being contiguous to plot No. 524 there could be no right of easement. He quoted several passages from B. B. Kartiyar's Treatise in the Law of Easement and License in India, 6th. Edition and Gile on Easement. As to the nature of Easement Mr. Mukherjee was right when he submitted that easement is necessary to a tenement and that it is not possible to have easement or right in gross. It is quite true that without there being a dominant tenement in existence it is not possible to have easement. Legal easement must enure to the benefit of the dominant tenement. But it is difficult to sustain his contention that easements with regard to right.

of way must be contiguous to the dominant tenement. Mr. Mukherjee referred to two English cases (1) *Ackroyd v. Smith*, 138 ER 68 and (2) *Thrope v. Brumfitt*, 1873(8) Ch. App. 650 for the proposition.

In Halsbury's Laws of England, Third Edition, Volume XII, Article 1237 it is stated that

"a right of way can validly be made appurtenant to land with which the way has no physical contiguity, but it must be beneficial in respect of occupation of that land."

A reference is made to the case of (3) *Todrick v. Western National Omnibus Co. Ltd*, 1934 Ch. 561, CA 1934 All England Reporter 25. It would appear that the point was specifically dealt within the said decision. Romer LJ while dealing with the point, stated :

"It is said on the part of the plaintiff, that it was not appurtenant to that land, and, therefore, could not pass to the defendants, because the road over which the right had been granted does not directly lead, except to an immaterial extent, on to the land coloured blue, but anyone using the road for the purpose of going to the land coloured blue must pass over some other land that belonged to Mr. Micholls and now belongs to the defendants. It is said in other words that there cannot be an easement of a way appurtenant to land unless the way ends upon the alleged dominant tenement-in other words, that the dominant tenement must be one of the termini of the roads in question."

Maugham, L.J. was of the view that it was contrary to the common understanding of the provision with regard to rights of way. Can the owner of the house not acquire by grant a right of way across a field opposite to, say, a highway on a Railway Station ?

"I believe the universal opinion is that such a way can be granted."

Again he asked "Can a owner of land not acquire a right of way leading to his tenement over two fields belonging to different owners ? I should imagine that such a right of way is constantly being acquired, and I can see no reason in common law why such an easement should not be acquired," Both Romer L.J. and Maugham L.J. differed from the decision in *Ackroid v. Smith* and *Thrope v. Brumfitt* Maugham L. J. was unable to see how there was anything in either of the two cases which supports the general proposition that a right of way can only be granted if the way leads right upto the dominant tenement.

6. It may be noted that the essential characteristics of an easement were noted by Gale on Easement, 11th Edition P. 19 and the same has been approved by the court of appeal and other courts in England. The passage is as follows :—

"According to the civil law it was necessary that a servitude should be productive of advantage to the dominant tenement. A mere

restriction upon the rights of the servient owner was invalid if unaccompanied by any benefit to the dominant owner or if such benefit were one merely personal to him. For the same reason no servitude could exist unless the dominant and servient tenements were sufficiently near to allow the one to receive benefit from the subjection of the order. So in English Law an easement must be connected with the enjoyment of a dominant tenement and must be for its benefit. Thus there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland."

There is, therefore, no manner of doubt on the basis of the English authorities that contiguity of tenement is not essential for the purpose of an easement over a right of way. It will be noted that emphasis is laid on the fact that easement of dominant tenement. Distance between Kent and Northumberland is cited to show that the same excludes the possibility of any benefit (connected) the enjoyment of a dominant tenement. It may be noted that the Indian Easement Act, 1882 does not in terms apply to West Bengal. Of course, the principles underlying provisions of the Act have been held to be applicable nonetheless (64 CWN 60). The principles of English Law, as noted above, do not seem to be in conflict either with the principles of justice, equity and good conscience or to the principles embodied in the Indian Easements Act. No argument has been advanced on that ground either.

7. Mr. Mukherjee's contention, therefore, cannot be upheld. Moreover, the question of contiguity itself is in dispute in this proceeding. I have already noted that while the plaintiffs contend that the passage stops short of reaching upto plot No. 524 the defendants claim that the passage runs upto and is contiguous to plot No. 524. There is no doubt, therefore, that question of contiguity itself is in dispute.

8. In the aforesaid circumstances the Rule must succeed. The petition is allowed. The Rule is made absolute. The judgment of the appellate court is set aside and the order of the learned Munsiff is restored.

9. There will be no order as to costs.

T.K.M.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Anil Kumar Sen

Decision : June 28, 1978

Samirendra Nath Keer & Anr. ... Petitioners

Versus

Debi Prasanna Ghosh & Ors. ... Opposite parties*

West Bengal Premises Tenancy Act (12 of 1956)—Sub-tenant—

*Civil Rule no. 1846 of 1973.

Position of—If a necessary party in Ejectment Suit against tenant—Ejectment decree not binding upon subtenant, if he has independent rights under the Act—Whether application made is bonafide.

If the position of the sub-tenant is such that he has independent rights under the West Bengal Premises Tenancy Act 1956, he would not be bound by the decree and as such he is not a necessary party. If on the other hand he has no such independent right he will be bound by the decree that may be passed against the tenant but even then, he is not a necessary party. That being the position, it is held that the application that was filed on rejection whereof a Rule having been obtained from this court the ejectment suit could be stayed successfully for five years, was not a bonafide application at all.

Amiya Kumar Chakraborty and D. P. Adhikari ... for the Petitioners
D. N. Lahiri and Shyamal Kumar Sen ... for the Opposite parties

The judgment of the Court was as follows :—

This Rule was obtained by the tenant defendants on a revisional application disputing the validity of an order dated February 23, 1973, passed by the learned Chief Judge, City Civil Court, Calcutta, in Ejectment Suit No. 823 of 1968. By the order impugned the learned judge has overruled the plea taken by the defendants that the suit as framed is not maintainable in the absence of the Sub-tenant. I have no manner of doubt that the learned judge has rightly dismissed the objection. If the position of the sub-tenant is such that he has independent rights under the West Bengal Premises Tenancy Act, he would not be bound by the decree and as such he is not a necessary party. If on the otherhand he has no such independent right he will be bound by the decree that may be passed against the tenant but even then he is not a necessary party. In this view, I am of the opinion that the application that was filed on rejection whereof a Rule having been obtained from this Court the ejectment suit could be stayed successfully for five years was not a bonafide application at all.

2. This application, therefore, fails and the Rule is discharged. The order passed by the learned Chief Judge is affirmed. The opposite parties are entitled to costs. Hearing fee is assessed at 10 (ten) Gold Mohurs.

3. Let the records be sent down forthwith by a Special Messenger at the costs of this Court.

P. R.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Salil Kumar Datta

Decision : August 11, 1978

Dilip Sur

..

...

...Petitioner

Versus

Sm. Pushpa Mitra & Anr.

...

...Opposite Parties*

West Bengal Premises Tenancy Act (12 of 1956) Sec. 17(2) & 17(3)—Default in making deposit for one month beyond due time—Application under sec. 151, C. P. C. for condonation of delay—Without enquiring into the truth of explanation for delay, court should not strike out defence against delivery of possession on application u/s. 17(3)—Presumption of correctness of explanation where no such enquiry is made—Dependence upon Advocate's clerk, whether necessary—Conduct of defendant is a necessary matter for consideration before any penal step be taken by court.

In an ejectment suit, the defendant filed applications under section 17(2) and 17(2A), which were disposed of on 18.8.76. It was held that the plaintiff and not her husband (P. K. Mitra) was the landlord of the defendant. The trial court also found that Rs. 5,865/- inclusive of interests was in arrears and directed the defendant to deposit the amount by monthly instalments from September 1976. It appears that the rent for August 1976, which was although deposited earlier in the name of the husband of the plaintiff was deposited on 22.9.76. in the name of P. K. Mitra. Thereafter it appears that the defendant deposited rent for that month again on 25.10.76 the day on which the court re-opened after the long vacation in the name of the plaintiff. The plaintiff filed an application under section 17(3) on 3.11.76 for default in depositing rent for August 1976 beyond the due date. The defendant filed objection to the plaintiff's application under section 17(3) stating that he made over the amount in the first week of September 1976 with the clerk of his Advocate. But unfortunately he detected during the Puja vacation that the amount was deposited on 22.9.76 in the name of P. K. Mitra. Thereafter the deposit for the same month again was made on the reopening day in the name of the plaintiff and he filed an application under section 151 of the Code of Civil Procedure for condonation of the delay in making the deposit. Both the applications were heard together and by the impugned order the learned Munsiff allowed the application under section 17(3) and rejected the defendant's application under section 151. The Rule is against that order of the learned Munsiff.

HELD : On consideration of the facts in the instant case, it appears that there is no warrant for the conclusion of the learned Munsiff that the defendant did not want to deposit rent for the month of August in compliance with the finding as to the relationship of landlord and tenant. It is

*Civil Rule no. 1997 of 1977.

to be further noted that in case of such deposits the litigant has to depend upon the clerk of his Advocate and unless it is established that no such amount was ever deposited with the clerk in time, it is hard to disbelieve the defendant's case that the amount was duly deposited with the Advocate's clerk in time. Further for the deposit in the wrong name of the husband, the responsibility, though ultimately on the tenant, was also of the clerk of the Advocate and of the Advocate in charge and the court has also to take into account the defendants' conduct in depositing the same on the reopening day after the long vacation on detection of the error. For these reasons, it will not be proper to penalise the tenant by striking out his defence against delivery of possession for defaults over which he has no control. That being so, the conclusion arrived at by the learned Munsif is not sustainable in law.

Case referred to :—

(1) *Radha Kishon Sao v. Gopal Modi & Ors.*, AIR 1977 SC 1217

• *Tapas Kumar Mukherjee* ... for the Petitioner
Bidyut Kumar Banerjee and Tapas Das ... for the Opposite party

The judgment of the Court was as follows :—

This Rule is directed against order No. 47 dated 30.3.77, whereby the learned Munsif allowed the application under Section 17(3) of the West Bengal Premises Tenancy Act while rejecting the defendant's application under section 151 of the Code of Civil Procedure.

2. The relevant facts are as follows :—

The plaintiff instituted the connected suit in 1974 for recovery of possession and the defendant's applications under section 17(2) and 17(2A) of the Act were disposed of on 18.8.76. It was held that the plaintiff, and not her husband P. K. Mitra proforma defendant was the landlord of the defendant. The learned Munsif also found that the sum of Rs. 5,865/- inclusive of interest was in arrears and directed the defendant to deposit the amount by monthly instalments of Rs. 200/- each from September 1976. It appears that the rent for the premises for August 1976, which was although deposited earlier in the name of the husband of the plaintiff P. K. Mitra, was deposited on 22.9.76 in the name of P. K. Mitra. Thereafter, it appears that the defendant deposited rent for this month again on 25.10.76 the day on which the court re-opened after the long vacation in the name of the plaintiff. The plaintiff filed an application under Section 17(3) of the Act on 3.11.76 for default in deposit of rent for August 1976 beyond the due date. The defendant filed objection to the said application under section 17(3) stating that he deposited the amount in the first week of September 1976 with the clerk of his advocate. But unfortunately he detected during the puja vacation that the amount was deposited on 22.9.76 in the name of P. K. Mitra. Thereafter, the deposit for the same month again was made on the re-opening day as

already stated hereinbefore in the name of the plaintiff and he filed an application on 15.1.77 under Section 151 for condoning the delay in making the deposit.

3. Both these applications were heard together and by the impugned order the learned Munsif allowed the application under section 17(3) of the Act while rejecting the application under section 151 of the Code. The Rule as already stated is against this order.

4. Mr. Mukherjee appearing on behalf of the petitioner submitted that in view of the facts stated in the petition of objection to the application under section 17(3), it appears that the defendant was not negligent in putting in the amount in court as required in law, as the amount was duly handed over to the clerk of his advocate who, however, did not deposit the same in time but deposited the amount much beyond due date in the name of the husband of the plaintiff. He submits that the delay in the circumstances should have been condoned by the learned Munsif. In support he relied on a decision reported in (1) *Radha Kishan Sao v. Gopal Modi & Ors.*, AIR (1977) SC 1217, in which it was held that, since the amount was deposited by the Nazir, in absence of a proper enquiry into the matter of delay of deposit at the hands of the Nazir and the reasons for it, the High Court was not right in second appeal, to penalise the tenant by striking out his defence and such penalty is to be kept distinct from the grounds of eviction. The Court noticed that the provision of Section 11A of the Bihar Buildings (Lease, Rent and Eviction) Act, 1947 are for the purpose of realisation of the arrears of rent pendente lite being in the nature of lawful enforcement of the conditions of tenancy and can be secured by the landlord at any stage of the litigation, whether in the trial Court or in appeals since appeal is a continuation of the suit, which obviously includes revision.

5. It is submitted by Mr. Mukherjee that in the instant case there was no enquiry made by the learned Munsif who simply held that it was clear that the defendant did not intend to deposit the rent for August 1976 with the Rent Controller in compliance with the findings as to the relationship. This finding, it is contended, is without enquiry and cannot be sustained.

6. Mr. Banerjee appearing for the landlord contended on the other hand that the tenant defendant in his deposit on 25th October, 1976 did not file any application stating reason for delay in deposit and it is only when the plaintiff filed an application under section 17(3) of the West Bengal Premises Tenancy Act, the defendant had come up with a cooked up story for explaining away delay in making the deposit. The case made out by the defendant was rightly disbelieved in the context of attending circumstances.

7. It appears that the defendant, according to his case, gave the

required money to be deposited in Court for the month of August 1976 to the clerk of his advocate. To this there is no denial nor the learned Munsif held any enquiry with regard to the averments. It is further case of the defendant that he detected delay of deposit only during the Puja holidays and thereafter re-deposited the amount in the name of the wife on the re-opening day. On consideration of the facts aforesaid it appears to me that there is no warrant for the conclusion of the learned Munsif that the defendant did not want to deposit rent for the said month in compliance with the findings as to relationship of landlord and tenant. It has also to be noted that in case of such deposits the litigant has to depend on the clerk of his advocate and unless it is established that such amount was ever deposited with the clerk in time, it is hard to disbelieve the defendant's case that the amount was duly deposited with the advocate's clerk in time. Further for the deposit in the wrong name of the husband the responsibility, though ultimately of the tenant, was also of the clerk of his advocate and of the advocate in charge and the Court has also to take into account the defendant's conduct in depositing the same on the re-opening day after detection of the error. For these reasons I do not think it will be proper to penalise the tenant by striking out his defence in the suit for defaults over which he has no control. In the view I have taken I do not think that the conclusion arrived at by the learned Munsif is sustainable in law.

8. The Rule accordingly succeeds and is made absolute. The impugned order is set aside and the deposit made by the defendant on 25.10.76 is accepted as due compliance with the requirements of law in this respect. The defendant's application under section 151 of the Code is allowed and the plaintiff's application under section 17(3) is dismissed. The defendant petitioner, however, will pay costs of this Rule to the plaintiff opposite party direct or to his advocate on record within three weeks from date, the hearing fee being assessed at 5 G. Ms. against a receipt to be granted by him showing the payment.

N. C. S.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Sunil Chandra Mazumdar

Decision : July 4, 1978

Ram Khelown Shaw

...

...(Deft) Petitioner

Versus

Sm. Keshari Debi (Koiri)...

...

...(Plff) Opposite Party*

West Bengal Premises Tenancy Act (12 of 1956), Section 17(2), 17 (2A) & 17(3)—When the order under section 17(2A) is complete—Until

*C. R. no. 1942 of 1977.

completion of order u/s. 17(2A), application u/s. 17(3) cannot be disposed of.

The opposite party filed an ejectment suit against the tenant defendant on the ground of default in payment of rent. Summons having been served, the tenant entered appearance in time and immediately thereafter filed an application under section 17(2) read with sections 17(2A) and 17(2)(b) of the W. B. Premises Tenancy Act. The tenant raised a dispute as to the rate of rent. The tenant's application was duly disposed of by the trial court by determining the rate of rent. Thereafter an application under section 17(3) was filed by the plaintiff alleging that the defendant had deposited in court the current rent for March 1976 and May 1976 beyond the prescribed time. As against this application, the defendant filed a petition of objection.

HELD : In his petition of objection, the petitioner has not disputed that the payment for March or May 1976 was not made according to law. It is also clear from the objection petition that the tenant has not given any excuse for delayed deposit. Though in a case for minimum default, the court can afford relief, but the court cannot give any relief suo motu unless the party gives some plausible and ostensible explanation for the default. Therefore the court cannot give any relief to the tenant because of the defect in his petition. But the tenant would get relief on a different consideration. It appears from the records that the order disposing of the tenant's application under section 17(2) and section 17(2A) was made on 2.2.77. On that day, the defendant was a defaulter in respect of deposits for March and May 1976 but neither the court nor the parties took notice of the same. Now, section 17(2A) is a very important provision which contains a non-obstanti clause by reason of which, section 17(2A) has got an over-riding power over sections 17(1) and 17(2) and the court has to consider whether the defendant is to be allowed to pay or deposit the defaulted amount in instalments and the period of default does not only cover the pre-appearance default but also defaults after appearance. In his petition under section 17(2A) the defendant made the prayer that the court should determine the period of default and allow the defendant to pay defaulted amount in instalments. But inspite of the existing defaults for March and May 1976, no order was made thereto. When the defendant is competent to make a prayer under section 17(2A) and claims a legal capacity to get a relief, the court should consider whether he should get that relief, otherwise the order under section 17(2A) would not be complete. That being so, the court should consider the application under section 17(3) after considering the application under section 17(2) and 17(2A) with reference to the defaults on March 1976 and May 1976. The fact that the defendant did not make any prayer for condonation of delay does not estop him from getting the relief which is a statutory one. Hence the order made under section 17(3) by the trial court has been set aside and the matter

has been sent back to the trial court for consideration of the defendant's application under section 17(2) and 17(2A) with reference to defaults made on March 1976 and May 1976 and after making an order comprehending these two defaults, it will take up the application under section 17(3).

Cases referred to :—

(1) *Sitala Devi v. Man Bahadur*, 76 CWN 435

(2) *Pulin Kumar Chowdhury v. Sachindra Mohan Bose*, 1978 (1) CLJ 646

Gopal Chandra Mukherjee for the petitioner
S. K. Acharyya and Monohar Chatterjee for the opposite party

The judgment of the Court was as follows :—

This matter arises after an application under section 115 of the Code of Civil Procedure against an order dated 9.5.77 under section 13(3) of the West Bengal Premises Tenancy Act passed by Shri N. K. Biswas, Munsif, Fourth Court at Howrah.

2. The facts of the case are that the suit was filed for eviction of the defendant petitioner by the plaintiff opposite party the defendant petitioner being a tenant in respect of the premises No. 38/42, Fakir Bagan Lane, Salkia. The suit was filed on the ground of default since January, 1975. The case of the plaintiff opposite party was that the petitioner was a monthly tenant at a rent of Rs. 20/- per month according to English Calender and on service of summons, the defendant appeared and the date fixed for appearance was 15.12.75. On 16.12.75 after appearance an application was filed under section 17(2) and 17(2A) as well as 17(2)(b) of the Act. In the application the defendant petitioner challenged the rate of rent at Rs. 15/- and not Rs. 20/- as alleged in the plaint, and prayed for determination of the rent. On 2.2.1977, the application under section 17(2) and 17(2A) was taken up and it was recorded that the defendant petitioner has been able to satisfy the court by documentary evidence that the rate of rent was Rs. 15/- and the plaintiff opposite party also admitted that. It was found by the learned Munsif that the petitioner paid rent from January, 1975 to November, 1975 and thereafter he deposited the rent in court on proper challan and there was thus no outstanding arrears. He held that there was no arrears of rent to be deposited in court but it is ordered that the defendant would go on depositing the current rent month by month in the court at the rate of Rs. 15/- which was found by the court on hearing both the parties. It appears that before the order dated 2.2.77 was passed disposing of the application under section 17(2) and 17(2A) the defendant petitioner had deposited in court the rent for March, 1976 and May, 1976 but those were not within 15th of the following month and, therefore, on 3.5.77 the plaintiff filed an application under section 17(3) alleging that the defendant has not been depositing the current rent month by month according to law and the rent for March, 1976 and May, 1976 have been illegally deposited. As against

this application made by the plaintiff opposite party, the defendant petitioner filed an objection and it was urged in that application that the statements made in the said application are not admitted and the petition is absolutely false and the defendant having complied with the provisions under sections 17(2) and 17(2A), the defence against delivery of possession cannot be struck off. The defendant did not dispute that the payments made in respect of March, 1976 and May, 1976 were not beyond the 15th of the following month as alleged by the plaintiff landlord. The learned Munsif on consideration of the petition and the objection under section 17(3) and after perusal of the challan came to the finding that it appeared from the challans that the defendant deposited rent for the month of March, 1976 on 19.4.76 and for May, 1976 on 18.6.76 i. e. beyond the statutory period and thereby attracted the mischief of section 17(3) of the West Bengal Premises Tenancy Act. It is this order of the learned Munsif under section 17(3) that is being challenged before this Court.

3. It has been urged by the learned Advocate for the petitioner that section 17 of the West Bengal Premises Tenancy Act if read between the lines would lead to the idea that on appearance in a court after getting summons, it is the statutory duty of the tenant to pay within one month of the service of the summons the amount of rent at which it was last paid subject to the provisions of section 17(2) of the Act and as in this case there was a dispute to the effect that in the plaint the rent was specified at Rs. 20/- and it was the case of the defendant that it was Rs. 15/- but till the adjudication of amount by the court, it was not possible for the defendant to know at what rate the amount excluding the pre-appearance arrears were to be paid. He deposited the pre-appearance arrears and there was no preliminary order passed by the court under section 17(2)(a) of the Act. It was not possible for the defendant petitioner to know at what rate the current arrears after appearance are to be paid and therefore, if by way of abundant caution, he deposited the rent for the months of March, 1976 and May, 1976, that deposit is not statutory deposit under the law and if there was any minimum default in the matter of deposit beyond the time-limit fixed by law, then the statutory penalty cannot be attracted because the deposit was not statutory but a deposit by way of abundant caution.

4. The learned Advocate for the plaintiff opposite party has contended that if the theory of the learned Advocate for the petitioner is accepted, the second part of section 17(1) of Act becomes nugatory. He has argued that under section 17(1) first part, the tenant has obligation under the law to pay to the Rent Controller or deposit in court on appearance all the pre-appearance arrears at the rate at which it was last paid and thereafter, the stage of section 17(2) comes.

5. Section 17(2)(a) lays down that a preliminary order fixing the rate of rent has to be passed but section 17(2)(a) prescribes that the order has to be passed as soon as possible within a period not exceeding one year. He has argued that if within one year no preliminary order is passed regarding the rate of rent in the event of the rate being disputed, in that case the tenant would sit tight without making any payment and the second part of section 17(1) would become nugatory. He has pointed out that the second part of section 17(1) is at once attracted into operation without any reference to section 17(2)(a) or (b) because, the second part lays down that the tenant after deposit of the pre-appearance arrears shall thereafter continue to deposit or pay month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate. He has argued that the words "at that rate" has reference to the word "last paid" in the first part of section 17(1) of the Act and has argued that in that event even before the passing of a preliminary order or a final order under section 17(2) the tenant will be under an obligation to deposit the current arrears after the lump deposit of the pre-appearance arrears month by month by the 15th of each succeeding month at the rate of Rs. 15/- per month, there was a statutory obligation to deposit the post appearance arrears at the rate last paid, and, therefore, if there was any default in making the payments for the months of March, 1976 and May, 1976 within the 15th of the following month, section 17(3) of the West Bengal Premises Tenancy Act would at once be attracted into operation because the language of section 17(3) is clear enough to invite penal consequences for non-compliance of the first part or the second part of section 17(1) of the Act. Whether the deposit of the pre-appearance arrears and the current post appearance rent was paid at the admitted rate or rate last paid makes no difference, as here the admitted rate and the rate at which rent was last paid is the same.

6. I have considered the arguments advanced by the learned Advocates for the petitioner and the opposite party. It is clear that the petitioner in his petition of objection has not disputed that the payment for March, 1976 or May, 1976 was not made according to law. It is also clear from the objection filed by the petitioner that the petitioner has not given any reasonable excuse for delayed deposit. From the case reported in the matter of (1) *Sitala Debi v. Man Bahadur*, (76 CWN 435) it was pointed out that though in case of minimum default, the court can afford relief, but court cannot afford relief *sue motu* unless the party gives some plausible and ostensible explanation for the default. So that there is no explanation offered by the petitioner on that behalf.

7. But in this case one thing is agreed. The order disposing of the application u/s. 17(2) and section 17(2A) was passed on 2.2.77. On that day the present defendant was a defaulter in respect of the payment made for March 1976 and May 1976 but neither the court nor the parties

took notice of the same. Now section 17(2A) of the West Bengal Premises Tenancy Act is a very important provision which contains a non-obstanti clause by reason of which, section 17(2A) has got an overriding power over sections 17(1) and 17(2) and the court has to consider whether the defendant is to be allowed to pay the defaulted amount in instalments and the period of default does not only cover the pre-appearance default but also defaults after appearance. In the petition u/s. 17(2A) the defendant made the prayer that the court should determine the period of default and allow the defendant to pay defaulted amount in instalments. But in spite of the existing defaults for March and May 1976, no order was passed thereto. When the defendant is competent to make a prayer u/s. 17(2A) and claims a legal capacity to get a relief, the court should consider whether he should get that relief; otherwise the order u/s. 17(2A) is not complete. In this connection, I may refer to the case reported in (2) 1978 (1) CLJ 646, *Pulin Kumar Chowdhury v. Sachindra Mohan Bose & Anr.* where Chittatosh Mookerjee J. pointed out.

“Where the court itself through inadvertance had failed to discharge its statutory duty in the matter of calculation of the arrear rent and the interest to be paid by instalments in terms of section 17(2A) (b) read with the proviso thereunder, there could be no question of waiver of such a statutory provision. Therefore, unless and until an application under sub-section (2A) of Section 17 is disposed of by the Court, the provisions of section 17(3) cannot be invoked. Only after a valid order under sub-section (2A) is made and there is a breach of the said order, the question of striking out of defence against delivery of possession under section 17(3), can arise”.

8. Under these circumstances, the Court should consider the application u/s. 17(3) after considering the application u/s. 17(2) and 17(2A) with reference to the defaults on March 1976 and May 1976. The fact that the defendant did not make any prayer for condonation of delay does not estop him from getting the relief which is a statutory one.

9. Hence it is ordered that the Rule be made absolute. The order u/s. 17(3) passed by the Ld. Munsif on 9.5.77 is hereby set aside. The matter is sent back to the Ld. Munsif for consideration of the application u/s. 17(2) and 17(2A) with reference to defaults on March 1976 and May 1976 and after passing an order comprehending those two previous defaults he will take up the application u/s. 17(3). Let the records be sent down as early as possible.

S.P.M.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee and Mr. Justice
Bankim Chandra Ray

Decision ; August 23, 1978

State of West Bengal & Ors. ... Appellants

Versus

Kisori Mohan Saha & Ors. ... Respondents*

And

State of West Bengal & Ors. ... Appellants

Versus

Brindaban Pal & Ors. ... Respondents*

West Bengal Rationing Order 1964—Paragraph 3 (5)—Power of State Government to amend, suspend etc. of appointment—Scope of—In granting interim Order, what the court should consider Interpretation.

Kisori and Brindaban moved two separate writ petitions challenging the orders of suspension of their respective relationship, delinking of ration cards from their respective A. R. shops and the initiation of disciplinary proceedings against them. A learned Single Judge issued two Rules but did not initially grant interim order as prayed for. Thereafter the petitioners had prayed for interim orders with notice to the respondents. Being aggrieved by the interim orders the State of West Bengal preferred these two Letter Patent appeals.

HELD : The terms and conditions of appointments of the two petitioners were governed by the West Bengal Rationing Order 1964. Under sub-paragraph (5) of Paragraph (3) of the said Rationing Order, whenever in the opinion of the State Government it is necessary or expedient so to do in the interests of the general public, the State Government may amend, vary, suspend or revoke any appointment made under Paragraph 3 of the said Rationing Order after making an enquiry. The power of the State Government under Paragraph 3 may be delegated and the Directed of Rationing had acted in the instant cases under such delegated authority of the State Government. The State Government or the delegated authority under the proviso to sub-paragraph (5), pending such enquiry against the holder of an appointment under sub-paragraph (1) of Paragraph 3 may suspend his appointment if it is of opinion that the immediate suspension is necessary in the interests of the general public. Thus the State Government may exercise its powers to suspend either as an interim measure or by way of punishment when it forms the opinion that it is necessary in the interests of the general public so to do. A suspension order under the proviso to Paragraph 3(5) does amount to a penalty but it is an interim order pending an enquiry contemplated under sub-paragraph (5) of Paragraph 3. The expression 'interest of the general public' prima facie is of wide import. The

*Appeals from Original Order nos. 807 and 809 of 1978.

State Government's power to suspend dealership of a retailer in terms of Paragraph 3(5) is not confined or limited to cases of contravention/violation of the Essential Commodities Act or Orders made in exercise of powers conferred by section 3 of the said Act. Therefore, when an alleged act or omission on the part of the appointed retailer does not amount to an offence or contravention of the W. B. Rationing Order 1964, the State Government or its delegated authority is entitled to consider whether or not in the interest of the general public the appointment of the retailer should be suspended. Further, the said authority is also entitled to form an opinion whether pending such enquiry an interim suspension should be made under the proviso to Paragraph 3(5) of the said Rationing Order 1964. The Court in a Writ proceeding can substitute its own opinion for that of the State Government as to whether it would be in the interest of the general public to suspend the appointment of a retailer pending an enquiry against him. At the same time the court would be entitled to scrutinise whether or not the order of suspension was passed by a competent authority. Secondly whether the competent authority had bonafide and upon consideration of the relevant materials formed requisite opinion about the interests of the general public in terms of Paragraph 3(5) of the 1964 Order.

An interim order of suspension under Paragraph 3 is not penal in nature and it is not necessary to consider whether the order of suspension of the dealership of the two petitioners were too harsh and not commensurate with the gravity of the charges levelled against them. Further the interim suspension Orders had already come into effect and the ration cards had already been de-linked from the two A. R. Shops of the petitioners before they moved this court for interim Orders. Therefore, before deciding the Rules on this merits this court would be slow in making mandatory interim orders for reinstating the appointments of the petitioners by way of re-linking to their shops the ration cards which had already been de-linked.

That being the position, the question of ad interim orders was not considered by the learned Single Judge from the correct legal stand point. Therefore these appeals should be allowed.

Case referred to :—

- (1) *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Prohlad Agarwalla*, AIR 1973 Cal. 167

S C. Ukil .. for Appellants in F.M.A. nos. 807 and 809 of 1978
 Subhas Banerjee, Anjan Kumar Mukherjee, Goutam Sen and ...
 Sudhanshu Sekhar Basu .. for Respondents in F.M.A no. 807 of 1978
 Saurendra Prosad Ghosh and Hajari Prosad Roychowdhury. * for Respondents
 * in F.M.A no. 809 of 1978

The judgment of the Court was as follows :—

Mookerjee : J.—Kisor Mohan Saha and Brindaban Pal, who are respectively the respondent No. 1, in these two appeals were “appointed

retailer" within the meaning of the West Bengal Rationing Order, 1964 in respect of two A. R. Shops. On July 3, 1978 the Director of Rationing, West Bengal by two separate orders in exercise of powers under sub-paragraph (5) of Paragraph 3 of the West Bengal Rationing Order, 1964 suspended their appointments as appointed retailer with immediate effect. The Deputy Controller of Rationing, Initial Area-I while forwarding the said suspension order directed the Rationing Officer of the Sub-Area concerned to delink all ration cards from the respective A. R. Shops and to re-link them to other neighbouring shops. The Director of Rationing on the same date by two memos informed Kisori Mohan Saha and Brindaban Pal that samples of sugar taken from their shops on chemical examination had been found to be *khandsari* whereas they had received sugar of C/D-30 quality from the F. C. I. Depot for distribution. The Director of Rationing by the said memos further stated that it appeared that the said two appointed retailers had substituted C/D-30 quality sugar by *khandsari* sugar and had distributed the latter variety which was much inferior and these acts on their parts were entirely unauthorised and illegal involving serious malpractice much to the detriment of public interest. The Director of Rationing called upon two retailers to show-cause to the Special Officer as to why their appointments as appointed retailers should not be revoked or they should not be awarded any other punishment as per law. The retailers were asked to state whether they wanted to be heard in person or through an agent. The Rationing Officer, Central Zone, Park Street, consequent upon the suspension of the appointments of these two persons had delinked the ration cards registered in their A. R. shops and had re-linked these cards to other A. R. shops.

2. Kisori Mohan Saha and Brindaban Pal filed two writ petitions challenging suspension of their retailership, delinking of ration cards from their respective A. R. shops and the initiation of disciplinary proceedings against them. A learned Single Judge was pleased to issue two Rules but did not initially grant interim orders as prayed for. Thereafter, these two petitioners had prayed for interim orders with notice to the respondents. The respondents did not file affidavits-in-opposition in the said temporary injunction matters but had opposed the prayers for interim orders. On July 21, 1978 his Lordship the Hon'ble Mr. Justice G. N. Ray after hearing both parties granted interim orders directing the respondents of the two Civil Rules not to proceed any further with the show-cause memos issued to the petitioners of the respective Rules. The said respondents were also directed not to give any effect or further effect to the impugned orders of suspension passed against the petitioners. The respondents were further directed to re-link the ration cards since delinked by the impugned orders to the shops of the petitioners. The said interim orders were directed to continue till the disposal of the

two Rules. On the prayer of the learned advocate for the State, the learned Single Judge stayed the operation of the said orders for a period of one week.

3. The State of West Bengal and others, being aggrieved by the aforesaid orders of his Lordship Mr. Justice G. N. Ray, have preferred these two appeals under Clause 15 of the Letters Patent. The operation of the interim orders granted by the learned Single Judge have also remained stayed pending the disposal of the two appeals. We have also considered the facts and circumstances of the cases. We regret that we are unable to agree with the learned Single Judge that the petitioners of the two Civil Rules should be granted interim orders as prayed for by them.

4. The petitioners were appointed retailers under Paragraph 3(1) of the West Bengal Rationing Order, 1964. Therefore, as retail dealers they were entitled to supply in accordance with the provisions of the said Order and the Regulations made thereunder 'rationed articles'. The State Government had subsequently inserted Rule 3B in the West Bengal Rationing Order, 1964. The said Rule 3B, *inter-alia*, provided that the State Government may specify the non-rationed articles which may be supplied along with the rationed articles through retail dealers appointed under sub-paragraph (1) of Paragraph 3. Any retail dealer who undertakes to distribute any quantity of such non-rationed articles shall be deemed to be a retail dealer under Paragraph 3(1) in respect of the said quantities of such non-rationed articles. It is not disputed that the State Government by a notification had specified 'levy sugar' as one of the non-rationed articles within the meaning of Rule 3B.

5. The petitioners of the two Civil Rules admittedly had undertaken distribution of both rationed and non-rationed articles including sugar. Therefore, *prima facie* they must be deemed to be holding appointments as retailers under the State in respect of both rationed and non-rationed articles. According to the appellants the petitioners who are respondent No. 1 in these two appeals had lifted C/D-30 quality sugar from the godowns of the Food Corporation of India for distribution to the holders of ration cards registered in their respective shops. But it is further alleged that they had supplied to these card holders *khandsari* and not C/D-30 quality of sugar. At this stage, it is not necessary to consider whether the said allegation of substitution by the two appointed retailers of one quality of sugar by another allegedly inferior quality of sugar was true or not because the said allegations are still to be enquired into. It is also not necessary to consider whether or not the said appointed retailers had committed any offence under the Essential Commodities Act in case they had substituted *khandsari* sugar in place of C/D-30 quality sugar received by them for distribution.

6. The terms and conditions of appointment of the two petitioners were governed by the West Bengal Rationing Order. Under sub-paragraph (5) of Paragraph 3 of the West Bengal Rationing Order, 1964, whenever in the opinion of the State Government it is necessary or expedient so to do in the interest of the general public, the State Government may amend, vary, suspend or revoke any appointment made under Paragraph 3 of the said Rationing Order after making an enquiry. The power of the State Government under Paragraph 3 may be delegated and the Director of Rationing had acted in the instant cases under such delegated authority of the State Government or the delegated authority under proviso to sub-paragraph (5), pending such enquiry against the holder of an appointment under sub-paragraph (1) of Paragraph 3 may suspend his appointment if it is of the opinion that immediate suspension is necessary in the interest of general public. Thus, the State Government may exercise its power to suspend either as an interim measure or by way of punishment when it forms the opinion that it is necessary in the interest of the general public so to do. A suspension order under the proviso to Paragraph 3(5) does amount to a penalty but it is an interim order pending an enquiry contemplated under sub-paragraph (5) of Paragraph 3. The expression "interest of the general public *prima facie* is of wide import. The State Government's power to suspend dealership of a retailer in terms of Paragraph 3(5) is not confined or limited to cases of contravention/violation of the Essential Commodities Act or orders made in exercise of powers conferred by Section 3 of the said Act. Therefore, even when an alleged act or omission on the part of an appointed retailer does not amount to an offence or contravention of the West Bengal Rationing Order, 1964, the State Government or its delegated authority is entitled to consider whether or not in the interest of the general public the appointment of a retailer should be suspended. After all, the terms and conditions of an appointed retailer are governed by the West Bengal Rationing Order and the State Government or the delegated authority is entitled to decide whether or not it would be in the interest of general public to suspend the appointment of a retailer who had allegedly substituted sugar entrusted to him for distribution to the holders of ration cards linked to his AR shop. *Prima facie*, an appointed retailer who has undertaken to distribute both rationed and non-rationed articles is bound to act according to the West Bengal Rationing Order and the Regulations framed thereunder and also the directions-orders issued by the authorities under the said Order and the Regulations. In the event it is alleged that an appointed retailer has committed breach of the West Bengal Rationing Order/Regulations, orders and/or directions of the State Government or its officers, the competent authority is entitled to bonafide form its opinion whether an enquiry should be held against the said appointed retailer to decide if any penal action should be taken under Paragraph 3(5) of the West Bengal Rationing

Order. Further, the said authority is also entitled to form an opinion whether pending such enquiry an interim suspension should be made under proviso to sub-paragraph (5) of Paragraph 3 of the West Bengal Rationing Order. The court in a writ proceeding can ^{not} substitute its opinion for that of the State Government as to whether it would be in the interest of general public to suspend the appointment of a retailer pending an enquiry against him. At the same time, the court would be entitled to scrutinise whether or not the order of suspension was passed by a competent authority. Secondly, whether the competent authority had bonafide and upon consideration of relevant materials had formed requisite opinion about the interest of general public in terms of Paragraph 3 (5) of the West Bengal Rationing Order.

7. *Prima facie*, the decision of the Division Bench in (1) *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Prohlad Agarwalla*, AIR 1973 Cal. 167, is not relevant for interpreting the power of making interim order of suspension conferred upon the State Government under proviso to paragraph 3(5) of the West Bengal Rationing Order, 1964. The Division Bench in *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Prohlad Agarwalla (supra)*, *inter-alia* held that contravention of a direction contained in a notification issued by the Iron and Steel Controller under Paragraph 14(2) of the Iron and Steel Control Order could not be deemed to be an order made under Section 3 of the Essential Commodities Act, 1955. Therefore, a contravention of such an order, direction of the Iron and Steel Controller was not punishable under Section 7 of the Essential Commodities Act. In the instant case, at this stage, it is not necessary to consider whether or not the notification issued under Paragraph 3B of the West Bengal Rationing Order, 1961 declaring sugar as a 'non-rationed article' should be deemed to be an Order under Section 3 of the Essential Commodities Act, 1955. We need not also enter into the question whether or not an alleged substitution of C/D-30 quality of sugar made over to the two appointed retailers and alleged sale of *khandsari* sugar by them to ration card holders amounted to an offence punishable under Section 7 of the Essential Commodities Act, 1955. As already stated that at this stage the only relevant question is whether the Director of Rationing who was exercising the delegated authority had bonafide formed an opinion that pending enquiry in the interest of general public it was necessary to suspend the appointments of the two appointed retailers.

8. An interim order of suspension under Paragraph 3 is not penal in nature and we do not propose to consider whether the order of suspension of the dealership of the two petitioners were too harsh and not commensurate with the gravity of the charges levelled against them. We have already pointed out that the appellants have alleged that the two petitioners had substituted C/D-30 quality of levy sugar received by them

from the Food Corporation of India and had allegedly distributed *khandsari* sugar. At this stage, we are also not prepared to prejudge and hold that the Director of Rationing had no authority to start an enquiry proceeding under Paragraph 3(5) of the West Bengal Rationing Order.

9. Further, the interim suspension orders had already come into effect and the ration cards had been already de-linked from the two AR shops of the petitioners before they moved this Court for interim orders. Therefore, before deciding the Rules on their merits this Court would be slow in making mandatory interim orders for re-instating the appointments of the petitioners by way of relinking to their shops the ration cards which had been already de-linked. The learned Single Judge in his order did not advert to the question of the interest of the general public. In the above view we hold that the question of interim orders was not considered from the correct legal stand-point. Therefore, this appeal should be allowed.

10. At this stage, as already indicated the Court upon consideration of the affidavit on behalf of the State and its Officers may consider whether or not the Director of Rationing had duly formed his opinion in terms of Paragraph 3(5) of the West Bengal Rationing Order and whether *prima facie* the said power under proviso to Paragraph 3(5) had been bonafide exercised. Further, the enquiry proceedings might be allowed to be continued subject to the decision in the Rule. We have already pointed out that the respondents did not file any affidavit before the learned Single Judge, before the disposal of the interlocutory matter. Therefore, the question of interim order if necessary may be again decided upon consideration of the affidavits of the parties and in the light of the provisions of Paragraph 3(5) of the West Bengal Rationing Order, 1964.

11. We, accordingly allow the appeals, set aside the orders of the learned Single Judge dated 21 July, 1978 granting interim orders. Liberty is given to the parties to file their affidavits both in the two Rules and in the interim injunction matters. The learned Single Judge may consider whether the Rules themselves should be disposed of as expeditiously as possible or the interim injunction matters should be again considered in accordance with law.

12. There will be no order as to costs.

Ray, J. : I agree.

T. K. M.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Pradyot Kumar Banerjee and

Mr. Justice B. C. Chakrabarti

Decision : July 12, 1978

Kalpana Dhar & Ors. ... (Deft) Appellants

Versus

Subodh Kumar Paul & Ors. ... (Plff) Respondents*

West Bengal Premises Tenancy Act (12 of 1956), Sec. 13(1)(b)—Ground for ejectment under—Construction of unauthorised structure without knowledge and consent of landlord—Even if such construction made outside demised premises—Test laid down—Structure made with brick and cement, whether a permanent structure.

Transfer of Property Act (4 of 1882), Secs. 108 (P) & 114A—Applicability in proceeding for eviction of tenant under W. B. Premises Tenancy Act 1956.

This appeal arises out of an ejectment suit after service of the requisite notice to quit. It has been specially alleged in the plaint that the tenant without the knowledge and consent of the landlord made unauthorised construction of a room with pucca walls of brick with cement by digging the roof of the house in various places and thereby contravened the provisions of clauses (m), (o) or (p) of section 108 of the Transfer of Property Act. It was further alleged that by a notice the defendant (tenant) was requested to demolish the structure but the defendant failed to do so.

Three points were argued by the learned Advocate appearing on behalf of the appellants ; (1) the disputed construction was outside the demised premises let out and as such section 13(i)(b) of the W. B. Premises tenancy Act read with section 108, clauses (m), (o), and (p) of the Transfer of Property Act does not apply ; secondly that the disputed structure is not a permanent structure ; and thirdly that, even if section 108 (m), (o) and (p) of the Transfer of Property Act applies, under section 114 of the Transfer of Property Act, the notice should have been given for three months to remove the disputed structure but such notice not having been given, the suit as framed is not maintainable.

HELD : *The disputed structure constructed with brick and cement cannot be said to be other than permanent in nature.*

During the continuance of the lease or tenancy, if the tenant erects or constructs any permanent structure in a portion to which the landlord or other tenants can have access, then that tenant will come within the mischief of section 108 (p) of the Transfer of Property Act and will be liable to be ejected. It will be no answer of the tenant that the portion in respect of which the tenant has made the construction is outside the demised

**Appeal from Original Decree No. 511 of 1970.*

premises. Such an interpretation will violate the reasonable interpretation of section 13(1)(b) of the W. B. Premises Tenancy Act read with section 108 of the Transfer of Property Act. The true test is whether the tenant can retain possession of the new construction he has made after his eviction from the demised premises. If the answer be "no", then any construction he has made will entail the eviction of the tenant if he has violated the provision of section 108 (p) of the Transfer of Property Act.

Section 114A of the Transfer of Property Act is not applicable to the present case. Even if it is held that section 114A applies, it should be held that section 114A in the facts and circumstances of the instant case should not be applied.

Cases referred to :—

- (1) *Suraya Properties etc. v. B. N. Sarkar*, 67 CWN 977 at 1002 : AIR 1965 Cal. 408
- (2) *Atul Chandra Lahiri v. Sanatan Daw*, 65 CWN 626
- (3) *G. C. Nandy v. M/s. J. N. Chatterjee*, 70 CWN 676
- (4) *Krishnadas Roy v. Basanta Kumar Sett and another*, FA 26 of 1977
- (5) *Brij Kishore v. Vishwa Mitter*, AIR 1965 SC 1574

A. K. Matilal, Sumitra Das Gupta ... for the Appellants
P. N. Bhattacharjee ... for the Respondents

The judgment of the Court was as follows :—

Banerjee, J. :—This appeal at the instance of the tenants arises out of a suit for eviction on the ground of contravention of the provision of clauses (m), (o) or (p) of section 108 of the Transfer of Property Act. The allegations made in the plaint are that the plaintiff-respondent is the landlord of premises No. 209/B, Acharya Profulla Chandra Road, Cal-4. The defendant was a monthly tenant in respect of a flat on the second floor of premises No. 209/B, Acharya Profulla Chandra Road, Calcutta-4, at a monthly rent of Rs. 35-50P payable according to the English Calendar month. Therefore the tenancy was determined by a combined notice to quit on 26th April, 1969. It is alleged that the tenant without the knowledge and consent of the landlord made unauthorised construction of a room with pucca walls of brick with cement by digging the roof of the house in various places and thereby contravened the provisions of clauses (m), (o) or (p) of section 108. It is further alleged that by notice dated 17th April, 1969 the defendant was requested to demolish the structure but the defendant failed to do so. Hence the suit. The court below decreed the suit brought by the plaintiff. Hence this appeal. During the pendency of the appeal, the defendant, Tara Pada Dutta, died leaving his widow Padma Rani Dutta and three daughters, Kalpana Dhar, Kabita Ghosh and Rubi Banerjee. Only the widow Padma Rani Dutta and other two daughters were impleaded as respondents.

2. Mr. Motilal at the time of hearing argued three points; firstly that the disputed construction was outside the demised premises let out and therefore section 13(1)(b) of W.B. Premises Tenancy Act read with section 108(m), (o) or (p) of T.P. Act does not at all apply; secondly, that the structure is not a permanent structure, and thirdly that, even if section 108(m), (o) and (p) of the Transfer of Property Act applies, under section 114 of the Transfer of Property Act, the notice should be given for three months to remove the structure but such notice not having been given, the suit as framed is not maintainable.

3. Mr. P.N. Bhattacharjee, on behalf of the respondent, however, contended that section 108 (m), (o) or (p) of Transfer of Property Act does apply in the facts and circumstances of this case. Moreover, it is argued that when the notice was given directing the defendant to remove the structure, a reply was given by the learned Advocate on behalf of the tenant that the construction of a very small room on the roof was made with the consent of the landlord and intended to be used as a temporary arrangement. (Vide Ext. 3a). As regards, the nature of the construction whether it is a permanent structure or a pucca structure, it is argued by Mr. Matilal that the structure is not a permanent structure and heavily relied on the case reported in (1) 67 CWN 977 at 1002 whereas Mr. Bhattacharjee relied upon (2) 65 CWN 626 (1) AIR 1965 Cal 408. The fact which could not be disputed in the Court below is that the tenant constructed a room unauthorisedly on the roof of the tenanted premises and the construction was of a room made of pucca wall of brick with cement with tiled shed on the roof of the premises in question. It has also been found that the structure is a permanent structure unauthorisedly built by the defendant without the consent of the plaintiff. The case of the defendant in the written statement and during trial however, is that he did not raise any structure on the suit premises but the structure was there on the roof when the premises was let out to the defendant. The plaintiff's evidence is that it was a pucca structure with tiles. The structure has been raised after digging the roof. In our opinion, the structure constructed with cement and brick cannot be said to be other than permanent in nature. In the case reported in (1) 67 CWN, 977 (*Suraya Properties etc. v. B. N. Sarkar*) at 1002 Mr. Justice P. N. Mookerjee held that "no hard and fast rule can be laid down in the matter, although certain broad tests may be formulated, which may conveniently guide the determination and facilitate the correct approach. Relevant from this point of view would be, *inter alia*, the nature of the structure or construction in question and the intention, with which it is made and, almost in every case, they would be primary and prime importance, the situs, the mode of annexation and the surrounding circumstances being all appropriate matters for consideration on the above two basic and usually determinant elements." The cases reported in (2) 65 CWN, 626 (*Atul Chandra Lahiri v. Sanatan Daw*)

(3) 70 CWN, 676 and AIR 1965 Cal., 408 did not say anything against that proposition. On this fact, Mr. Matilal contended that this element is absent. In our opinion, Mr. Matilal is wrong. It is clear from the evidence that the structure has been constructed on the roof of the house. The construction was with bricks and cement. It is not clear from the defendant's evidence that the construction was only for temporary use. On the other hand the defendant's whole case is that it was not constructed by him and there was a structure on the roof when the demised premises was let out. In that view of the matter, in our opinion, it cannot be said that the structure is not a permanent structure. We, therefore, hold agreeing with the learned Judge that the structure is a pucca structure of a permanent nature and it was unauthorisedly constructed by the tenant without consent of the landlord. We also agree with learned Judge's findings that the said construction was made by the tenant after digging the roof. In our opinion, therefore, the tenant violated the provision of section 108(p) of the Transfer of Property Act and thereby section 13(1)(b) W. B. Premises Tenancy Act is attracted.

4. Mr. Matilal contended that the construction was outside the demised premises and therefore the tenant is not liable to be evicted. The next contention of Mr. Matilal is that the construction being outside the demised premises, section 13(1)(b) and for that matter section 108(p) is not applicable. If this contention is to be accepted, the tenant will have a right to make any construction outside the demised premises, and continue with impunity as a tenant in respect of the tenancy. In our opinion, that cannot be a reasonable interpretation of section 13(1)(b) of the West Bengal Premises Tenancy Act. In an unreported case, being (4) F. A. 26 of 1977 (*Krishnadas Roy v. Basanta Kumar Sett. & Anr.*) decided on 10th February, 1978 it has been held that if a tenant has made any construction in a passage through which alone the ingress and egress is possible, the landlord is entitled to get a decree of eviction under section 13 of the West Bengal Premises Tenancy Act. In our opinion, during the continuance of the lease or tenancy if the tenant erects or constructs any permanent structure in a portion to which the landlord and/or other tenants can have access, then he will come within the mischief of section 108(p) of the Transfer of Property Act and will be liable to be ejected. It will be no answer of the defendant-tenant, as has been argued by Mr. Matilal, that the portion on which the tenant has made the construction is outside the demised premises. In our opinion, this interpretation will violate the reasonable interpretation of section 13(1)(b) West Bengal Premises Tenancy Act read with section 108 of the Transfer of Property Act. The true test, in our opinion, is whether the tenant can retain possession of the new construction he has made after his eviction from the demised premises. If the answer is 'no', then any construction he has made will entail the eviction of the tenant if he has

violated any provision of section 108(p) of the Transfer of Property Act.

5. The case reported in (5) AIR 1965 SC. 1574 (*Brij Kishore v. Vishwa Mitter*) on which both Mr. Matilal and Mr. Bhattacharjee relied does not, in our opinion, apply in the facts of the present case. The said case was one for eviction of a tenant under clause (k) of section 14(1) of the Delhi Act on the ground of erection of unauthorised structure. Section 14(1)(k) and 14(11) run as follows :—

“14(1)(k). Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant :

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely :—

* * * *

(k) that the tenant has, notwithstanding previous notice, used or dealt with the premises in a manner contrary to any condition imposed on the landlord by the Government or the Delhi Development Authority or the Municipal Corporation of Delhi while giving him a lease of the land on which the premises are situate” ;

“14(11). No order for the recovery of possession of any premises shall be made on the ground specified clause (k) of the proviso to sub-s. (1), if the tenant within such time as may be specified in this behalf by the Controller, complies with the condition imposed on the landlord by any of the authorities referred to in that clause or pays to that authority such amount by way of compensation as the Controller any direct.”

6. The argument was whether the addition of sub-s. (11) in section 14 is a radical departure from what section 13(1) or whether it is a clarification and/or modification of the previous provision. In the said context section 114-A of the Transfer of Property Act was considered by the Supreme Court and their Lordships held that under section 114-A the Court has power to give relief to the tenant against forfeiture and further held that it would have been open to a Court to give relief to the tenant who had remedied the breach either before the suit was filed or even after the suit had been filed depending upon what the Court considered to be reasonable time. In the present case we have seen that the structure was not an unauthorised one and that it was there even when the defendant was inducted as a tenant. In the circumstances, therefore, in our opinion, section 114-A of the Act cannot be applied. The defendant did never apply before the Court below for removal of the structure

nor did he say that the construction was done by them. The Court below on fact found that the construction was done by the tenant unauthorisedly. It is also clear that they were asked to remove the structure by the landlord. In the circumstances, therefore, in our opinion, even if it is held that section 114-A applies, it must also be held that section 114-A of the Act in the facts and circumstances of the case should not be applied.

7. We, therefore, are of the opinion, in the facts and circumstances of this case that the tenant's appeal must be dismissed.

8. The appeal is accordingly dismissed. There will be no order as to costs.

Chakrabarti, J. : I agree.

N. C. S.

[CRIMINAL REVISIONAL JURISDICTION]

Before Mr. Justice Sudhindra Mohan Guha

Decision : July 28, 1978

Asgar Ali Sk. & Ors. Petitioners
Versus

Golam Rasul & Anr. Opposite Parties*

S. 249, Criminal Procedure Code—Complaint of offence under sections S. 457/381 I. P. C.—Complainant's application for time rejected by Magistrate on the day fixed for hearing—Accused acquitted by Magistrate—Whether Magistrate's order could be set aside by Sessions Judge in revision—Whether appeal under S. 378 (4) proper remedy,

HELD: An offence under S. 457/380 I. P. C. being cognisable and not compoundable, the Magistrate had no power under S. 249 of the Criminal Procedure Code to order acquittal of the accused by reason of the absence of the complainant on the day fixed for hearing. The Sessions Judge had jurisdiction under S. 397 of the Criminal Procedure Code to set aside such a manifest irregularity and illegality in the proceeding before the Magistrate.

Cases referred to :—

- (1) *Chairman, Village Panchayath Nagathihalli v. Thimmasetty Gowda*, AIR 1965 Mys 62
 - (2) *Bhimappa Bassappa Bhu Sannevar v. Laxman Shivaravappa Samagouds & Ors.*, AIR 1970 SC 1153
 - (3) *Khetra Basi Samal & Anr v. State of Orissa*, AIR 1970 SC 272
 - (4) *Ramchandra Keshar Adka v. Gobinda Jati Chavare & Ors.* AIR 1975 SC 915
 - (5) *Khelawan Singh v. Emperor*, 38 Cr. LJ 334
- Sudip Kumar Majumder and Debi Prosad Sengupta* ... for the Petitioners
G. C. Pal for the Opposite parties
Biren Mitra and Krishna Ghosh for the State

*Criminal Revision Case No. 659 of 1977.

The judgment of the Court was as follows :—

By the impugned order the learned Sessions Judge, Burdwan set aside the order of acquittal passed by the Magistrate in a case started on a complaint by opposite party no. 1 against the petitioners.

2. The present petitioners were summoned under sections 457/380 IPC, and Sri B. Ali, Judicial Magistrate, Kalna adjourned the case no. C.R. 239/75 to 23.8.76 for examination of the P.Ws. On that day an application was filed for allowing time for examination of witnesses, but the learned Magistrate by his order dated 23.8.76 rejected the prayer and acquitted the accused persons.

3. It is observed by the learned Sessions Judge that the Magistrate has no authority even to discharge the accused persons but he acquitted them after rejecting the petition for adjournment. As it was in utter disregard of the provisions of the Code of Criminal Procedure and as the order of acquittal was not based on appreciation of the evidence, the learned Judge observed that the Sessions Court in revision had ample power to set the matter right. In this view of the matter the impugned order was set aside and the learned Magistrate was directed to proceed according to law.

4. On reference to sections 378(4) and 401 (4) Cr. P.C. it is argued on behalf of the petitioners that the remedy of the opposite party was not in filing an application for revision but was to file a regular appeal against the order of acquittal on obtaining special leave from the High Court. As the provision for appeal is provided against the order of acquittal and as no appeal was preferred, section 401 (4) bars a private party from having recourse to a revision petition. In support of his argument the learned Advocate relies on the decisions of the Mysore High Court in (1) *Chairman Village Panchayath Nagathihalli v. Thimmasetty Gowda*, reported in AIR 1956 Mysor page 62 and of the Suureme Court in (2) *Bhimappa Bassappa Bhu Sannavar v. Laxman Shivarayappa Samagouda and ors*, reported in AIR-1970 SC 1153. He also cites the decision in (3) *Khatra Basi Samal and anr. etc. v. State of Orissa etc.* reported in AIR 1970 SC 272, to show that the Supreme Court only in exceptional cases would exercise the power of revision when it is invoked by a private complainant against an order of acquittal.

5. The present case was started against the petitioners under section 457/380 IPC. These offences being not compoundable and being cognizable, in the absence of the complainant the learned Magistrate could not discharge the accused persons under section 249 Cr. P.C. After exhausting all the processes against the witnesses cited by the complainant for attendance the learned Magistrate, of course, could discharge the accused persons under section 245(2) for reasons to be recorded by him, and if he was of the opinion that the charge was groundless. But instead of doing so he acquitted the accused persons.

6. In support of the order passed by the learned Sessions Judge the learned advocate for the opposite party no. 1 refers to a decision of Judicial Committee in *Nazir Ahmad and the king Emperor* reported in 63 IA 372, wherein it is laid down that the rule that where a power is given to do a certain thing in a certain way the thing must be done in that way to the exclusion of all other methods of performance or not at all, is applicable to a Magistrate, who is a Judicial Officer. The same view was also expressed by the Supreme Court in (4) *Ramchandra Keshar Adke v. Gobind Joti Chavare & ors.* reported in AIR 1975 SC 915. The learned Counsel also refers to the decision of the Nagpur High Court in the case of (5) *Khilawan Singh v. Emperor*, reported in 38 Cr. L. J. 334. It is held therein that ordinarily the High Court will interfere but rarely revision with acquittals, particularly so in cases where the correctness of the acquittal cannot be considered without a consideration of the evidence, but when a case comes to the notice of the High Court where the acquittal has depended not on an appreciation of the evidence but has occurred in complete disregard of the Code of Criminal Procedure, the High Court should interfere despite the fact that no appeal has been preferred. It is rightly pointed out by the learned Sessions Judge that under the present Criminal Procedure Code (Act No II of 1974) section 397 vested both the High Court and the Sessions Court with identical powers of revision.

7. In this case the learned Magistrate had absolutely no jurisdiction or power to acquit the accused persons in the absence of the complainant. It goes without saying that there was a glaring defect in the procedure and there was a manifest error on a point of law and consequently there had been a flagrant miscarriage of justice. That being the position, the learned Sessions Judge was amply justified in assuming jurisdiction under section 397 Cr. PC for setting the matter right. It should also be remembered that the order of acquittal was not passed on appreciation of evidence. So the learned Sessions Judge seems to be perfectly justified in rectifying the illegality, irregularity, impropriety or in other words mistake appearing on the face of the order itself. In this view of the matter the order passed by the learned Sessions Judge not being without jurisdiction does not warrant interference.

8. In the result, this application for revision fails and the Rule is accordingly discharged.

S. P.T.

[CRIMINAL REVISIONAL JURISDICTION]

Before Mr. Justice Ram Krishna Sharma

Decision : July 11, 1978

Bimal Ranjan Roy and Anr. Petitioners

Versus

State of West Bengal Opposite party*

Fertiliser (Control) Order 1957—Inspection and seizure made by Inspector of police without authority—Notification dated 17.9.74 indicating competency of officers to inspect and seize—Charge u/s. 7(1), Essential Commodities Act—Cognizance taken—Proceeding started before Magistrate—Proceeding quashed because of illegality in taking action initially without authority.

On 30.1.77, one Sri K. K. Chakravorty, Inspector of Police, D.E.B. (S) Balurghat with the help of another officer checked the fertiliser shop belonging to the petitioner herein. In the course of such inspection it was detected that the stock register and other records were not properly maintained and several other irregularities were also detected. Accordingly the entire stock of fertiliser and records were seized. Thereafter an information was lodged and investigation was carried by the Inspector of Police, D.E.B. (S) and submitted a charge sheet under section 7(1) of the Essential Commodities Act in the Court of the Chief Judicial Magistrate, West Dinajpur. Thereafter the Charge under section 7(1) of the Essential Commodities Act was framed against the petitioners. Thereafter a date was fixed for examining the prosecution witnesses and on that date an application was filed before the court below praying for staying all further proceedings of the case on the ground that the petitioners would move the High Court for quashing the whole proceeding on the plea that K. K. Chakravorty, Inspector of Police, D.E.B., West Dinajpur who had inspected the petitioners' shop and godown and seized several articles and thereafter lodged the complaint with the police was not the Inspector of Fertiliser as defined in paragraph 19 of the Fertiliser (Control) Order 1957 and as such the complaint investigation and cognizance taken by the learned Magistrate was abinitio bad in law. Thereafter the petitioners obtained this Rule.

HELD: In the instant case, it appears that the inspection and seizure was made without authority by Sri K. K. Chakravorty Inspector, D. E. S. and as such the inspection and seizure were both illegal and consequently the investigation carried on thereafter and cognizance of the case taken became illegal and void. Accordingly the proceedings pending before the learned Magistrate are quashed. The Rule is made absolute.

Sobhendu Sekhar Roy for the Petitioner

Asit Kumar Goswami for the State

*Criminal Revision Case no. 96 of 1978.

The judgment of the Court was as follows :—

Bimal Ranjan Roy and another are the petitioners in this case. At their instance the Rule was issued calling upon the opposite party State to show cause why a proceeding pending against the petitioners in the court of the Chief judicial Magistrate, West Dinajpur, should not be quashed. The brief facts which have given rise to the present petition may be stated thus. On the 30th of January 1977, in the afternoon informant K.K. Chakravorty, Inspector of Police D.E.B. (S) Balurghat, with the help of another officer Sri B.K. Banerjee checked the fertiliser shop named and styled as Messrs Sabuj Supply Agency at Gangarampur which belonged to the petitioners who are the partners of the said shop. In the course of such inspection it was detected that the stock register and other records were not properly maintained and there was no display of the price board in front of the godown of fertiliser and having not done that the petitioners had violated the provisions under paragraphs 4 and 21 of the Fertiliser (Control) Order 1957. The entire stock of fertiliser and records were seized. Thereafter an information was lodged and investigation was carried by Sri B.K. Banerjee, Inspector of Police, D.E.B.(S) and submitted chargesheet under section 7(1) of the Essential Commodities Act in the court of the Chief Judicial Magistrate West Dinajpur. On 16.7.77, the charge under section 7(1) of the Essential Commodities Act was framed against the petitioners. Thereafter 17.9.77 was the date fixed for examining the prosecution witness. An application was filed on that date before the court below on behalf of the petitioners praying for stay of all further proceedings on the ground that this court would be moved under section 482 of the Code of Criminal Procedure, 1973 for quashing the whole proceeding on the ground that K.K. Chakravorty, Inspector of Police, D.E.B. West Dinajpur who inspected the shop and godown of the petitioners and seized fertiliser and records and thereafter lodged complaint with the police was not the Inspector of Fertiliser as defined in paragraph 19 of the Fertiliser (Control) Order 1957, and as such the complaint, investigation and cognizance taken by the learned Magistrate were ab initio bad in law and illegal. Thereafter the trial of the case was adjourned from time to time and the petitioners came up before this court with their application for quashing the proceedings.

2. Mr. S.S. Roy, learned Advocate appearing on behalf of the petitioners submits that the Inspector of Fertiliser has been appointed by Notification No. 2702. Fort dated the 17th September 1974, issued in the Department of Agricultural and Community Development, Government of West Bengal, and published in the Calcutta gazette, part I, september 17, 1974. A perusal of the above notification shows that under Entry No. 21 a Sub-Inspector of Police and officers above the rank of Inspector attached to the Enforcement Branch were designated as Insspector

of Fertiliser within their respective areas of work. Mr. S. S. Roy contends that Inspector K.K. Chakravorty, D.E.B. who carried the inspection of the fertiliser shop in question was only an Inspector attached to D.E.B., that is to say, District Enforcement Branch, but under Entry No. 21 all the officers above the rank of the Inspector attached to the Enforcement Branch were designated as Inspector of Fertilisers. Therefore, not being the Inspector of Fertilisers it is contended that K.K. Chakravorty had no authority to inspect the said shop. So the inspection and seizure was carried and made by a person unauthorised under the law. It is contended that the entire inspection seizure was illegal and void abinitio and the subsequent proceedings including cognizance taken by the learned Magistrate became void and illegal.

3. Mr. Goswami learned Advocate appearing for the State contends that although it is true that only the officers above the rank of the Inspector attached to the Enforcement Branch were Fertiliser Inspector within their respective areas of work it is not as contained whether K.K. Chakravorty was an Inspector of Fertiliser or not. Mr. Goswami submits that he should be given further time to make enquiry in this regard. I find no reason to allow further time to the State who had prior notice about the matter. The point urged before this court was specifically taken in paragraph 9 of the petition by the petitioners, in spite of that no material has been placed before this court to show that K.K. Chakravorty was a Fertiliser Inspector within the meaning and ambit of Notification No. 2902 Fert dated the 17th September 1974.

4. It is apparent that the inspection and seizure was made without authority by K.K. Chakravorty, Inspector, D.E.B. Therefore the inspection and seizure were both illegal, consequently the investigation carried on thereafter and cognizance of the case taken became illegal and void.

5. In the circumstances this court has no other option but to quash the proceedings pending before the learned Chief Judicial Magistrate, West-Dinajpur. The proceedings are accordingly quashed. The rule is made absolute and the petition is allowed.

6. Let the records go down to the court below as quickly as possible.

N. C. S.

[SPECIAL JURISDICTION (INCOME TAX)]

Before Mr. Justice Dipak Kumar Sen and Mr. Justice Chandan

Kumar Banerjee

Decision : January 20, 1978

Commissioner of Income Tax, West Bengal-II Appellant

Versus.

Smt. Ashima Sinha Respondent*

Acquisition of Property under Section 269C of the Income Tax Act, 1961—Method of Valuation where the entire premises were let out—Whether reversionary method can be adopted in preference to 'yield or rental method'.

The respondent sold premises no. 74A, 74B and 74C, Elliot Road, Calcutta-16 (hereinafter referred to as the said property) in equal undivided shares to Mst. Sayeeda Khatun and Mst. Fatima Khatun by executing two separate conveyances both dated the 10th December, 1973 for Rs. 40,000/- each. The entire premises were let out to tenants. On the basis of the location of the said property and amenities the Valuation Officer of the Department determined the fair market value of the said property at Rs. 1,16,000/-. The Competent Authority initiated proceedings for acquisition of the said property under Section 269C of the Income Tax Act, 1961 on the basis of the said report of the Valuation Officer. The fair market value of the property exceeded the apparent consideration by 45%. On hearing objection and after obtaining the approval of the Commissioner of Income Tax, the Competent Authority made an order for acquisition of the said property under Section 269F (6) of the said Act. The competent authority upheld the reversionary method of valuation applied by the Valuation Officer. The Tribunal following the decision of this Court in the case of *Controller of Estate Duty, West Bengal v. Radhadevi Jalan*, reported in 67 ITR 761 allowed the appeal and set aside the order of acquisition passed by the Competent Authority. The Commissioner of Income Tax preferred an appeal under Section 269H of the said Act against the said order of the Income Tax Appellate Tribunal. Dismissing the said appeal of the Commissioner.—

HELD : (a) *The Tribunal has correctly applied the principles laid down in Radhadevi Jalan in the instant case.*

(b) *If a statutory control is imposed on a commodity, restricting the price, or transfer, or distribution of the same then, the commodity ceases to be a commercial commodity as understood in common parlance and becomes a controlled commodity and its effective value is its controlled value and not an imaginary commercial value. If the State chooses to impose statutory control in respect of terms and conditions of tenancies in properties and such control is statutorily enforced then during the subsistence of such control such properties would necessarily have a value which is controlled. The*

*Income-tax Appeal No. 5 of 1976

State cannot then turn round and say that for other purposes the properties would have a notional commercial value. To hold otherwise would be to ignore the realities.

(c) There is no principle or logic in the 'reversionary method' of valuation as applied by the Departmental Valuation Officer. In the method adopted by the Valuation Officer the value of the land is taken twice, being included in the amount arrived at by the yield or rental method and again under the 'reversionary method.' This is entirely a novel approach and is erroneous.

Cases referred to :—

- (1) *Controller of Estate Duty, West Bengal v. Radha Devi Jalan*, 67 ITR 761
- (2) *Rustom Cavasjee Cooper v. Union of India*, AIR 1973 SC 564
- (3) *J. N. Bose v. Commissioner of Wealth Tax, West Bengal-II* 104 ITR 83
- (4) *Controller of Estate Duty v. Bijoy Kumar Khandelwal*, 108 ITR 864

<i>B. L. Pal and Ajit Sengupta</i>	...	...	.. for the Appellant
<i>P. K. Pal and R. N. Dutta</i>	...	...	...for the Respondent

The judgment of the Court was as follows :—

Sen, J. : The proceedings which have culminated in this appeal and the facts relevant thereto are as follows :—

2. Ashima Sinha, the respondent herein, sold premises Nos. 74A, 74B and 74C, Elliot Road, Calcutta-16 (hereinafter referred to as the said property) in equal undivided shares to Mst. Sayeeda Khatun and Mst. Fatima Khatun by executing two separate conveyances both dated the 10th December, 1973 for Rs. 40,000/- each.

3. Statements under section 269P (1) of the Income-tax Act, 1961 in the prescribed form and verified in the prescribed manner were duly filed by the transferees along with a copy of the instrument of transfer disclosing the following particulars :—

(a) The said property consisted of a partly two and partly three storeyed building together with one-storeyed out-houses in a total area of 6 Cottahs, 5 Chittacks and 25 sq. ft.

(b) The buildings were approximately over 50 years old.

(c) The entire premises were let out to tenants.

(d) The fair market value of the undivided half part of the said property was approximately Rs. 35,000/-.

4. By his communication in writing dated the 13th June 1974, the Inspecting Assistant Commissioner Acquisition Range I, Calcutta, a competent authority, within the meaning of section 269B of the Income-tax Act, 1961, made a reference to the Assistant Valuation Officer Unit

No. III under section 269L(1), requiring the latter to determine the fair market value of the said property and make a report.

5. Pursuant thereto, the said Valuation Officer inspected the said property on the 26th June, 1974 and on the 9th July, 1974 submitted his valuation report, *inter alia*, stating as follows :—

(a) The said property was situated in a middle class residential area with all civil amenities.

(b) The buildings in the said properties were not properly maintained.

(c) The buildings were electrified and had Corporation tap connection as also sewerage connection which, however, had out-lived their utility.

(d) The building was about 60 years old and past its useful life and its future life was estimated to be only 20 years more.

(e) The premises were fully tenanted, total rent realised being Rs. 820. 37p. per month.

(f) There was every possibility for extension of the property.

6. On the basis of the location of the said property and amenities available, the market price of the land was determined at Rs. 20,000/- per cottah aggregating Rs. 1, 26, 300/-. The valuation of the said property however was determined to be Rs. 1,16,000/- which according to the Valuation Officer was the fair market price of the said property, the half share thereof being valued at Rs.58,000/-.

7. The actual computation of the Valuation Officer was as follows :—
Rental Method of Valuation

Gross annual rent	Rs. 820.37 × 12 = Rs. 9,844/-
Less outgoings	
1. Municipal tax 4 × 2 (Rs. 7.69 + 161.75 + 9.42)	Rs. 1431/-
2. Govt. revenue payable annually Rs. 15/7/4	Rs. 16/-
3. Maintenance & Repair 1/16 of 9844 (1431 + 16)	Rs. 1400/-
4. Management & collection charges @6% of Rs. 9844 — (1431 + 16)	= 504 (-)
	Net annual return : Rs. 3,351/- Rs. 6,493/-

Capitalised value :—

For 20 years life years @7% with
redemption capital @4@ = Rs. 6493/-
x 9.654

= Rs. 62,513

Less capital repair done by vendees

=L.S.= (-)

= Rs. 3,000

Total structural value on 10.12.74

Rs. 59,513

Land

Land value on reversion land=6K.

5 ch. 2sqft.=6.315 cottahs @20,000/-
per cottah.

= Rs. 1,26,300/-

Salvaged value of building 10% of
the estimated reproduction cost of

bldg. i.e. @ 10% of Rs. 2,40,000/-

Rs. 24,000/-

Rs. 1,50,300/-

Deferred for 20 years @5% Y.P=0.3769 x Rs. 1,50,000/-

=Rs. 56,648/-

Total value of the property by Rental method as on 10.12.74

1. Structure Rs. 59,513/-

2. Land Rs. 56,648/-

Rs. 1,16,161/-

Rs. 1,16,000/-

8. On the 24th August, 1974, the competent authority initiated proceedings for acquisition of the said property under section 269C of the Act after recording his reasons for such initiation stating, *inter alia*, that on the basis of the report of the valuation officer the fair market value of the property exceeded the apparent consideration by 45% (i. e. more than 25%).

9. On the same date i. e. the 24th August, 1974 the competent authority issued and had duly published a notice under section 269D(1) of the Act inviting objections against the proposed acquisition under section 269E.

10. Objections were perferred both by the transferees as also the transferor against the proposed acquisition. It was *inter alia*, contended on behalf of the transferees that—

(a) The valuation by the said Valuation Officer, was not correct and was based on guess without evidence.

(b) The estimation of the value of the land at Rs. 20,000/- per cottah was erroneous and without any evidence.

(c) The said property was not situated in a middle class residential area. There was a bustee covering 10 bighas on its south and on its east. A valuation report of H. Sarkar, Chartered Engineer and Valuer was enclosed in support of the objection.

The objections of the transferor, *inter alia*, were as follows :—

(a) The said property was incorrectly described as being located in a middle class residential area. Even the tenants in the property were of lower income group.

(b) The only method of valuation of the said property, a fully

tenanted premises, was the rental method.

(c) The reversionary method of valuation was incorrectly applied by the said Valuation Officer.

(d) The property being fully developed and tenanted and rent restriction legislation being in force, valuation of the said property by the land and building method would be inappropriate.

11. At the hearing of the objections under section 269F of the Act instances of contemporaneous sale of property in the neighbouring area were cited on behalf of the transferee as follows :—

1. 93, Elliot Road —Registered on 23.3.69
Price—Rs. 1,01,000/-
Area—15K, 5ch. 25 sft.
Two storied—1/6th self occupied
and the remaining portion tenanted.
2. 82, Elliot Road —Regd. 16.5.69—Rs. 1,35,000/-
Area—12K, 3 ch. 18 sft.
4 storied, fully tenanted.
3. 86, Elliot Road —Regd. 6.11.71—1/3rd sold
Rs. 30,000/. Total—9K, 11 ch.
17 sft.

12. The transferee also relied on and filed another valuation report of the said H. Sarkar dated the 12th August, 1973.

13. On hearing the said objections and after obtaining the approval of the Commissioner of Income-tax, the competent authority made an order for acquisition of the said property under section 269F (6) of the Act. The instances of contemporaneous sale cited on behalf of the objectors in respect of premises Nos. 82 and 93, Elliot Road were distinguished by the competent authority on the ground that the said transactions took place before Chapter XXA of the Income-tax Act, 1961 had come into force and therefore went unchallenged. He also noted that between 1969 and 1971 the city of Calcutta was in a very disturbed condition on account of which land price in the city had shown a sharp decline.

14. The competent officer upheld the reversionary method of valuation applied by the Valuation Officer accepting that the building in the said property was a very old structure and had a future life of only 20 years whereafter, it would have to be demolished and the land would revert back to the owner as vacant land. It was also accepted that the purchase had been made on that basis and who as the vacant land would become available for further construction. The competent officer rejected the valuation report of H. Sarkar Comparing the sale on the 31st March 1974 of a corner plot measuring 53.8 cottahs situated at the junction of Elliot Road and Acharya Jagadish Bose Road for

Rs. 15,00,000/- i.e., at the rate of 28,000/- per cottah, the competent authority held that the proper consideration had not been truly stated in the instrument of transfer.

15. For the purposes of wealth tax the said property had been last assessed at Rs. 65,000/-. The competent authority noted that even on such admitted valuation the transaction resulted in a substantial capital gain and therefore he concluded that the transaction was designed to facilitate concealment of further liability to capital gains tax.

16. Being aggrieved by the above order of the competent authority the transferor preferred an appeal to the Income-tax Appellate Tribunal. In the said appeal the following further facts were elicited on behalf of the transferor :

a) The transferor had purchased the said property on the 4th March, 1952 in a court auction for only Rs. 45,100/-.

b) Earlier, the property had been leased out on a total rent of Rs. 104/16p. per month. After the expiry of the said earlier lease in June, 1971 new tenants were inducted at an enhanced total rental of Rs. 820/- per month.

c) The husband of the transferor was murdered on the 31st January, 1971 in the disturbances prevailing at that time resulting in nervous breakdown of the transferor.

d) Being a lady and residing away from the said property, the transferor could not manage the said property and had no other alternative but to sell the same at the best price available.

e) At the time of the sale, rents aggregating Rs. 8,251/- were in arrears which were assigned by the transferor in favour of the transferee for only Rs. 6,188/-.

17. On the basis of the aforesaid it was submitted that the consideration for the transfer was the fair market value of the said property and had been correctly shown in the instrument of transfer and, in any event, was the actual amount involved in the transfer.

18. It was contended further that the property having been sold without reservation there was no question of any reversionary interest being valued as was done by the Valuation Officer. The property was fully tenanted. The tenants could neither be evicted nor their rent enhanced by reason of restrictive legislation and therefore, the appropriate and the only method of valuing the said property was to capitalise the annual rent by a number of year's purchase. It was contended that the proper multiple to be applied was 12 and if this was done the value of the property would be much less than the consideration shown in the instrument of transfer.

19. On the other hand, it was contended on behalf of the Revenue that, admittedly, the property was about 60 years old and therefore the addition of the reversionary value of the land was fully justified. It was

also submitted that the total built-up area in the property was 5510 square feet which was fetching a rent of only Rs. 820/- per month, i.e. at the old rate of 15p. per square feet which was not reasonable. Therefore, the valuation of the said property on the basis of yield would not be justified. It was further contended that of 4547 square feet, the total area, 1264 square feet had been left vacant indicating that there was scope for further development of the property and for this reason also, the valuation of the said property on yield basis would not be justified.

20. The transferor contended in reply that under the municipal requirements for the area, one third of the total area in the premises had to be left open and, therefore, there was no question of any further development of the said property. It was also submitted that the yield of the property was not on the basis of old rates of rent as the property had been let out to new tenants in 1971.

21. After consideration of the respective submissions, the Tribunal following a decision of this Court in (1) *Controller of Estate Duty, West Bengal v. Radha Devi Jalan*, reported in 67 ITR 761 held that by reason of the provisions of the rent control statutes, the only proper method of valuation was by application of a multiple to the net yield of the property which the Tribunal determined to be $12\frac{1}{2}$. The Tribunal also held that the said property having been sold in two undivided half shares, a further deduction of 10% would have to be made. On the above basis the fair market value of the property on the date of the transfer was found to be less than Rs. 80,000/- which was the value mentioned in the instrument of transfer. Accordingly, the Tribunal allowed the appeal and set aside the order of acquisition passed by the competent authority.

22. The present appeal before this Court has been preferred by the Commissioner of Income-tax, West Bengal II under section 269H of the Act against the said order of the Income-tax Appellate Tribunal.

Mr. B.L. Pal, learned counsel for the appellant, has urged before us the following grounds from the Memorandum of Appeal :

(a) The Tribunal erred in holding that the only proper method of determining the fair market value of the property was by applying a multiple to the net yield from the property.

(b) The Tribunal erred in rejecting the method of the Valuation Officer being the reversionary method of valuation inasmuch as the said property had an additional economic life of 20 years.

(c) The Tribunal failed to take into consideration that the total area of land was 4547 square feet out of which 1264 square feet which had been left vacant on which there could be further development of the property.

(d) The Tribunal erred in proceeding on the basis that the proper multiple should be only $12\frac{1}{2}$.

23. Mr. Pal contended that the fair market value of the said property could be determined by applying more than one method and if the valuation was made by only applying the yield method the result would be incorrect. If in valuing a property on the method known as the 'land and building method' a higher valuation than that obtained by following the method known as "yield or rental method" was obtained, the same must be accepted as correct. Even if the "yield or rental" method was applicable it would be necessary to check the result arrived at by applying the other methods including the "land and building" method.

24. Mr. Pal next contended that where the land was not fully developed or where the return from the land was controlled and not commercial then value determined solely on the basis of "yield or rental" method would be incorrect or misleading. Mr. Pal submitted that in the instant case the said property included vacant land measuring 1264 sqft. which provided scope for further development of the property.

25. Mr. Pal next submitted that in the instant case the rent or yield from the said property was only 15p. per square feet which was neither the reasonable nor commercial rent for a building in the locality. Accordingly, the method followed by the Tribunal, i.e., the yield or rental method was wholly inapplicable in the instant case.

26. Mr. Pal next submitted that the method applied by the Valuation Officer i.e. "reversionary method" which was based partly on the "yield or rental method and partly on the land and building" method was applicable in the instant case as the property had an available economic life of 20 years.

27. Mr. Pal finally submitted that, in any event, "yield or rental" method applied in the instant case has not been correctly computed in as much as the Tribunal had applied a multiple of only $12\frac{1}{2}$ which was very low. On a higher and proper multiple being applied even on the "yield and rental" method the valuation could be computed at a much higher figure.

28. In support of his contentions Mr. Pal cited the following "Principles & Practice of (a) Parks Valuation" 4th Edition pp. 37, 38 :

"When land is fully developed by buildings erected thereon ; when the property is let at a rent from which the fair rent can be ascertained ; and when the rent has been proved and is likely to be maintained for years to come, then the rental method of valuation should be applied to determine the market value of the premises.".....

"When a property is valued on the rental basis, the result is the value of the land and buildings taken together and cannot afterwards be apportioned..... This does not mean the land and building method cannot be employed to check a valuation done by the rental method. It simply states that after capitalisation of the rent you can not deduct

the depreciated value of the buildings on the land, and say that the result is the definite value of the land."

(2) *Rustom Cavasjee Cooper v. Union of India*, reported in AIR 1970 SC 564. In this decision the Supreme Court considered the vires of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. One of the main question involved was whether "compensation" in such an acquisitive statute would in consonance with Article 31 of the constitution be a just equivalent in money of the property acquired or whether the said expression did not mean a just equivalent and the court cannot go into the propriety or adequacy or reasonableness of compensation under the said Article of the Constitution. The Supreme Court held that law providing for acquisition must either fix the compensation or specify the principles on which and in the manner in which the compensation is to be determined. Mr. Pal relied on the following passage from the majority judgment of the Supreme Court at p. 609.

"The important methods of determination of compensation are —(i) market value determined from sales of comparable properties, proximate in time to the date of acquisition, similarly situate, and possessing the same or similar advantages and subject to the same or similar disadvantages. Market value is the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase; (ii) capitalization of the net annual profit out of the property at a rate equal in normal cases to the return from gilt edged securities. Ordinarily value of the property may be determined by capitalizing the net annual value obtainable in the market at the date of the notice of acquisition (iii) where the property is a house, expenditure likely to be incurred for constructing a similar house, and reduced by the depreciation for the number of years since it was constructed; (iv) principle of reinstatement, where it is satisfactorily established that reinstatement in some other place is bonafide intended, there being no general market for the property for the purpose for which it is devoted (the purpose being a public purpose) and would have continued to be devoted, but for compulsory acquisition. Here compensation will be assessed on the basis of reasonable cost of reinstatement; (v) when the property has out grown its utility and it is reasonably incapable of economic use, it may be valued as land plus the break-up value of the structure. But the fact that the acquirer does not intend to use the property for which it is used at the time of acquisition and desires to demolish it or use it for other purpose is irrelevant; and (vi) the property to be acquired has ordinarily to be valued as a unit. Normally an aggregate of the value of different components will not be the value of the unit.

These are, however, not the only methods. The method of

determining the value of property by the application of an appropriate multiplier to the net annual income or profit is a satisfactory method of valuation of lands with buildings, only if the land is fully developed, i.e., it has been put to full use legally permissible and economically justifiable, and the income out of the property is the normal commercial and not a controlled return or a return depreciated on account of special circumstances. If the property is not fully developed, or the return is not commercial the method may yield a misleading result."

29. Mr. R. N. Dutt, learned counsel for the respondent, drew our attention to the undisputed facts of the instant case noted earlier and cited the following decisions in support of the order of the Tribunal: (a) *Controller of Estate Duty, West Bengal v. Radha Debi Jalan* (supra). Here certain premises were being valued for assessment of estate duty. The said premises were in the occupation of an old tenant who was paying a monthly rent of Rs. 1600/-. The Appellate Tribunal estimated the valuation of the property on rental basis. On a reference, it was contended before this Court that the Tribunal should have determined the real value of the property on the basis of what the property would fetch if sold in the open market at the relevant time. This Court rejected the contention and upheld the order of the Tribunal with the following observations (at p. 765-766).

"The contractual rent of Rs. 1600/- per month was payable by the tenant in respect of a building, which at the material time was governed by the West Bengal Premises Tenancy Act, 1956. Under the operation of the various rent restrictions Acts, which have been operating in the State for now well over quarter of a century, landlords have lost the right of letting out their houses at any rent they choose and of evicting tenants on such grounds as appeal to them. Contractual relationship between landlords and tenant have given way to statutory relationship imported by successive rent restriction Acts and the position now is that houses may be let out only at "fair rents" and at no more. If premises can no longer be let out at such rent as the landlord may expect or aspire, then however, costly the premises may otherwise be, their value have to be determined on the basis of the limitation imposed by the statute."

It was further observed (at p. 769-770) as follows:—

"When a person buys a property, he does so for two purposes (a) to obtain an annual income (b) to obtain security for his capital. If the property was merely a vacant land, it might be developed and made to yield such income, as it was capable of, in a metropolitan area where some sort of scarcity for accommodation prevails. The property was however, burdened with a tenanted house and the income therefrom was controlled by a statute. This control on income was bound to

react on the value of the property and application of the land and building method would not have been a proper method in the instant case."

(b) (3) *J. N. Bose v. Commissioner of Wealth Tax, West Bengal II*, reported in 104 ITR 83. Here it was held by this Court in the context of Wealth Tax Act, that there are different methods of valuation of immovable property and which one would be suitable for a particular property would depend upon the particular features thereof.

(c) (4) *Controller of Estate Duty v. Bijoy Kumar Khandelwal*, reported in 108 ITR 864. In this case the Tribunal in determining the market value of a property under section 36 of the Estate Duty Act, 1953 held that the gross rental value was the proper method to be applied to ascertain the market value of the property concerned. The Assam High Court held that the Tribunal did not commit any error of law by computing the valuation on the rental method in preference to the other methods.

30. We do accept the contention of Mr. Pal that the said property was not fully developed. Out of a total area of 4547 square feet only 1264 square feet had been left open. No evidence was led to show if this 1264 square feet was in the form of one regular plot or consisted of aggregation of open spaces unconnected with each other. The property has been sold to two persons in undivided equal shares. The vacant land in each share will not exceed 632 square feet i. e. an area less than one cottach. The requirement of the Corporation of Calcutta is that one third total of an area should be left vacant therefore the available area for development in the instant case would be only about 200 square feet in each undivided share. In our view the scope for future development of the said property is negligible.

31. In *R. C. Cooper* (supra) the Supreme Court was considering what would be a fair compensation where property was being acquired compulsorily and not what would be the fair market value when such property was being voluntarily transferred by the owner for a consideration. The Supreme Court held that application of the "yield or rental" method to value vacant business premises in urban areas on the basis of estimated rental would lead to misleading results and would not ensure adequate compensation. The following observations of the Supreme Court (at p. 612) make the position clear :-

"Under Explanation 2, clause (1) "ascertained value" in respect of buildings which are wholly occupied on the date of the commencement of the Act is twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let from year to year reduced by certain specific items. This provision, in our judgment, does not lay down a relevant principle of valuation of buildings. In the first place, making a provision for payment of capitalised annual

rental at twelve times the amount of rent cannot reasonably be regarded as payment of compensation having regard to the conditions prevailing in the money market. Capitalization of annual rental which is generally based on controlled rent under some State Acts at rates pegged down to the rates prevailing in 1940 and on the footing that investment in buildings yields $8\frac{1}{3}$ per cent. return furnishes a wholly misleading result which cannot be called compensation. Value of immoveable property has spiralled during the last few years and the rental which is mostly controlled does not bear any reasonable relation to the economic return from property ...

"There is in the present conditions considerable value attached to vacant business premises in urban areas. True compensation for vacant premises can be ascertained by finding out the market value of comparable premises at or about the time of the vesting of the undertaking and not by capitalising the rental actual or estimated. Vacant premises have a considerably larger value than business premises which are occupied by tenants. The Act instead of taking into account the value of the premises as vacant premises adopted a method which cannot be regarded a relevant. *Prima facie*, this would not give any reliable basis for determining the compensation for the land and buildings."

32. Moreover, we find that rent restriction legislation do not generally apply to premises in which the Government is interested either as a tenant or as a landlord. Therefore, when the Government acquires property, the fact that there are tenants in the property is irrelevant for the purpose of computing compensation as the Government is not restricted from removing such tenants. Therefore, in determining compensation payable for property acquired by the Government valuation of the property on the basis of actual yield would be unfair to the owner.

33. The discussion in Parks "Principles and Practice" of "Valuation" cited by Mr. Pal does not advance the case of the Revenue any further. According to Parks a fully developed and tenanted property fetching a steady rent has to be valued by the "yield or rental" method. No doubt "land and building" method might be applied even in such a case to check the value arrived at by the former method but it is not the opinion of Parks that in such cases the result arrived at by "land and building" method must be accepted in preference to that obtained by the "yield and rental" method.

34. The said property, therefore, is a property fully developed and let out to tenants in its entirety. The quantum of rent realised has been duly determined and such rent is likely to be maintained for years to come. The method indicated in Parks 'Valuation' at p. 37 clearly applies on such fact and, in our opinion, the Tribunal has rightly applied the 'yield or rental method' for the valuation in the instant case.

35. We entirely agree with the principles laid down in *Radha Devi Jalan* (supra) and find that the Tribunal has correctly applied the same in the instant case. If a statutory control is imposed on a commodity, restricting the price, or transfer, or distribution of the same then; in our opinion, the commodity ceases to be a commercial commodity as understood in common parlance and becomes a controlled commodity and its effective value is its controlled value and not an imaginary commercial value. If the State chooses to impose statutory control in respect of terms and conditions tenancies in properties and such control is statutorily enforced then during the subsistence of such control such Properties would necessarily have a value which is controlled. The State can not then turn round and say that for other purposes the properties would have a notional commercial value. To hold otherwise would be to ignore the realities.

36. We have failed to understand either the principle or the logic of the "reversionary" method of Valuation as applied by the Valuation Officer of the Department in the instant case. After following the "yield or rental" method and having arrived at a figure the Valuation Officer has added to it the value of an imaginary reversion in future. We invited Mr. Pal to cite any authority which has approved or even indicated this method but he was unable to do so. It is stated in *Parks Valuation* (at p. 38) that when a property is valued on rental basis the result is the value of the land and building taken together which cannot afterwards be apportioned. In the method adopted by the Valuation Officer the value of the land is taken twice, being included in the amount arrived at by the 'yield or rental' method and again under the "reversionary" method. This is an entirely a novel approach but in one view erroneous.

37. The only other point to be considered is whether the Tribunal applied a proper multiplier i. e. $12\frac{1}{2}$ times. In our opinion, this point is academic. The Valuation Officer applied the rental method and computed the capitalised value of the said property at Rs. 62,513/-, by applying a multiplier of only 9.654. The assessee's valuer has applied a multiple of $12\frac{1}{2}$ which was accepted by the Tribunal. The appellant has no reasons to be aggrieved as a multiplier higher than that suggested by its own valuer has been applied.

38. Apart from the report of the Valuation Officer no other relevant evidence was available before the competent authority or the Tribunal in support of the case of the Revenue. No comparable figures of other sales were brought on record. The vacant land sold on the 31st March 1974 at the rate of 28,000/- per cottah was situated at the junction of Elliot Road and Acharya Jagadish Chandra Bose Road. There cannot be any comparison between that property and the property with which we are concerned.

39. For the reasons above, it cannot be said that the Tribunal erred in choosing an accepted method of valuation, namely, the "yield or rental" method in preference to other methods.

40. Accordingly, the appeal fails and is dismissed. The respondent will be entitled to costs. Interim orders will continue for a period of 8 weeks from date.

Banerji, J. : —I agree.

A. S. G.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Chandan Kumar Banerjee

Decision : September 1, 1978

Paresh Chandra Dutta

...

...

Petitioner

Versus

Collector of Calcutta & Ors.

...

... Respondents

West Bengal Services (Classification, Control and Appeal) Rules 1971 Rule 10(12)—Mandatory provision—Order of dismissal challenged in writ petition—Position and power of Authority acting in place of appointing authority on leave—Government money—Whether Govt. can claim as its money the Bank deposits made out of contribution of employees—Opportunity denied to petitioner to cross-examine Govt. witness—Second show cause notice—Evidence of Authorities' biased mind in conducting disciplinary proceeding.

In the instant case, the charge-sheet was not issued by the authority who was entitled to or empowered to issue the charge sheet on the date when the same was issued and therefore the same was bad and cannot be sustained. Admittedly there were certain charges which are based merely on suspicion and suspicion cannot be made a ground for charging a person with guilt. The money in question could not be termed as Government money inasmuch as the same was deducted by the petitioner from the salaries of the employees for depositing the same in the Savings Bank which belonged to the employees, from whose salaries the same was deducted. Even the money while remaining in the Savings Bank cannot and could not acquire the character of the Government money and the Government could not claim any right, title and interest therein. No reason has been assigned by the Disciplinary Authority in accordance with the provisions contained in Rule 10(12) of the West Bengal Services (Classification, Control and Appeal) Rules 1971 as to the higher punishment sought to be inflicted upon the petitioner. The fact that the witness who was examined by the respondents without informing the petitioner and without affording him any opportunity to cross-examine the witness vitiated the enquiry proceedings. The disciplinary authority proceeded

*Civil Rule No. 1189 (w) of 1976.

with a biased mind as would be evident from the second show cause notice and in fact the petitioner was not given any opportunity to challenge the findings of the enquiring authority. The second show cause notice also is bad and cannot be sustained.

Cases referred to :—

- (1) *T. R. Pandey v. The Chief Commissioner, Andaman & Nicobar Islands and Ors.*, (1978) Lab. I. C. 41
- (2) *K. K. Murty v. The General Manager, South Eastern Railway and Anr.*, 62 CWN 169
- (3) *A. R. S. Choudhury v. The Union of India and Ors.*, 60 CWN 933
- (4) *Nand Kishore Prasad v. State of Behar and Ors.*, 1978 Lab. I. C. 1106
- (5) *State of Assam v. Bimal Kumar Pandit*, AIR (1963) SC 1612
- (9) *Union of India v. H. C. Goel*, AIR (1964) SC 364

Kashi Kanta Maitra, Adya Nath Ghosh and Alike Ghosh... for the Petitioner
Sakti Prosad Mukherji ... for the Respondents

The judgment of the Court was as follows :—

The petitioner was a Lower Division Clerk in Comilla, Tippora Collectorate. After the partition of India the petitioner co-opted for India and was posted in the Land Acquisition Collectorate in Calcutta. Thereafter he was confirmed as an Upper Division Clerk in the Election Department and subsequently he acted as Nazir of the Collectorate. Against the said promotion of the petitioner there was representation by other employees and thereupon the petitioner was demoted to his original post of Lower Division Clerk by the Divisional Commissioner. The petitioner moved this Court under Article 226 of the Constitution of India and obtained a rule and an order of injunction against the said order of demotion of the petitioner in C.R.7447(w) of 68. On 28th June, 1969 the petitioner was served with a chargesheet. The charges mainly were ; (1) the petitioner collected certain amounts from the salaries of the staff on the pay day for depositing in the respective Cumulative Deposit Accounts (Savings Bank and Postal) of each person but the same were not deposited promptly and kept the same with him and when the irregularity was brought to the notice of the authorities the deposits were made by the petitioner long afterwards whereby the said depositors were put to loss on account interest, (2) the said amounts which were not duly deposited by the petitioner were monies belonging to the Government of India and therefore the petitioner had no right to keep the money in his hand without duly accounting for the same and the amount was unauthorisedly and without the consent and knowledge of the Officer-in-charge of Collectorate was held by the petitioner, (3) the conduct of the petitioner in non-complying with the rules gave rise to the suspicion that the petitioner temporarily defalcated

Government money. The petitioner was asked to show cause why he should not be dismissed from his service or otherwise dealt with. In reply to the said show cause notice, the petitioner submitted a written explanation on the 4th July, 1969. The petitioner appeared before the Enquiring Authority and cross-examined the witnesses produced by the said authority. The said authority, however produced and examined another witness but the petitioner was neither informed nor had any knowledge of the said witness and had no opportunity to cross-examine him.

2. By an order made by the Collector on the 28th August, 1970 the petitioner was reverted to the post of Lower Division Clerk without giving the petitioner any second notice to show cause against the punishment proposed to be inflicted. Against the said order of reversion the petitioner moved a writ petition in this Court, being C.R. 1507(w) of 1970. *Amiya Kumar Mookerji, J.* by his judgment and order dated 20th November, 1975 quashed the said order of reversion on the ground that before the order of reversion no second show cause notice was issued to the petitioner. By the said order opportunity was, however, given to the Collector to issue a second show cause notice and to proceed in accordance with law, and all points taken in the said writ petition were left open. On the 12th December, 1975 the Collector of Calcutta gave the impugned second show cause notice to the petitioner. The second show cause notice, however, proceeded on the basis as if the Collector, that is, the disciplinary authority, had made up his mind that the petitioner was guilty of the charges made against him and it was stated therein that the said disciplinary authority in agreement with the enquiring officer was satisfied that the petitioner had been found guilty of all the charges brought against him, even leaving aside the evidence of Assistant Collector (Small Savings) Witness No. 7 whom the petitioner had no opportunity to cross examine. By the said second show cause notice the said disciplinary authority proposed to impose upon the petitioner the penalty of dismissal from service as specified in Clause (viii) of Rule 8 of the West Bengal Services (Classification, Control and Appeal) Rules, 1971. It was further stated that in exercise of the power conferred by Article 311 of the Constitution of India read with sub-rule (12) of Rule 10 of the West Bengal Services (Classification, Control & Appeal) Rules, 1971, the said disciplinary authority called upon the petitioner to submit within seven days from the date of receipt of the said second show cause notice any representation which the petitioner might wish to make on the penalty proposed to be imposed on him, that is, penalty of dismissal from service. The petitioner was supplied with a copy of the report of the Enquiring Officer. The petitioner made representation against the same and submitted his explanation thereto and also called upon the respondent No. 1 to revoke, cancel or withdraw the said second show cause

notice and not to give effect to the punishment proposed either by the Enquiring Officer or by the said show cause notice.

3. Mr. Kashi Kanta-Maitra, learned Advocate for the petitioner contended that the chargesheet was bad inasmuch as the same was not issued by the disciplinary authority. It was issued by the respondent No.2 who was at the time discharging the functions of the respondent No.1 as a stop-gap arrangement. In paragraph 5 of the affidavit-in-opposition affirmed by Sri Sankar Mukherji, Collector of Calcutta, the respondent No.1 affirmed on 28th March, 1978 it is admitted that the respondent No.2 was acting in the position of the respondent No.1 because of the absence of the respondent No.1 at the relevant time. Mr. Maitra also referred to a Notification dated 12th March, 1969 issued by the Deputy Secretary, Land and Land Revenue Department, Government of West Bengal, whereby the Governor appointed the respondent No.2 to act as Treasury Officer, Calcutta Collectorate (which is same as the Collector) in addition to his own duties as the Deputy Collector of Land Revenue for the period from 13.6.69 to 17.6.69 when Sri A.R. Biswas, the Collector was on leave. Mr. Maitra contended that the subsequent Notification giving retrospective effect could not validate an act, particularly which affected the rights of the petitioner, which act was done and performed at a time when he had no authority in that behalf. Mr. Maitra also referred the decision of the Central Government on Central Civil Services (Classification, Control and Appeal) Rules 1965 whereby it was decided as under :—

“Officers performing current duties of a post cannot exercise Statutory powers under the Rules—An Officer appointed to perform the current duties of an appointment can exercise administrative or financial powers vested in the full-fledged incumbent of the post but he cannot exercise statutory powers whether those powers are derived direct from an Act of Parliament (e.g. Income Tax Act) or Rules, Regulations and Bye-laws made under various Articles of Constitution (e.g. Fundamental Rules, Classification Control and Appeal Rules, Civil Service Regulations, Delegation of Financial powers Rules etc).

Mr. Maitra in support of his above contention relied on the following decisions :—

(A) (1) *T.R. Pandey v. The Chief Commissioner, Andaman & Nicobar Islands and Ors.*, reported in (1978) Lab I. C. 41 where a Division Bench of this Court quoted with approval the said decision of the Central Government and came to the conclusion that one Mr. Narayana who issued the order of punishment in that case was not competent to pass the said order inasmuch as he did not have any authority on the date of passing of the said order.

(B) (2) *K.K. Murty v. The General Manager South Eastern Railway and anr.*, reported in 62 CWN 169. Here a single Judge of this Court

relied on his own decision in (3) *A.R.S. Choudhury v. The Union of India & ors*, reported in 60 CWN 933 and observed as follows :—

“The charge-sheet ought to be in the name of the punishing authority... ..It is obvious that in the very nature of things a show cause notice cannot be issued except by an authority which can punish and which calls upon a delinquent to explain his conduct with a view to inflict punishment if the explanation is insufficient or unsatisfactory. It is unthinkable that any self-chosen champion can take upon himself to investigate the commissions and omissions of a civil servant although he might have no power to inflict any punishment.....”.

4. Mr. Maitra next contended that the chargesheet was also bad and liable to be set aside and quashed inasmuch as the same was based on suspicion. A suspicion of guilt cannot be made the basis of an offence and a man cannot be punished on suspicion nor can his position be jeopardised on mere suspicion. In support of his contention Mr. Maitra cited a decision of the Supreme Court in (4) *Nand Kishore Prasad v. State of Behar and ors*, reported in 1978 Lab IC 1106, where the Supreme Court observed as under :—

“Disciplinary proceedings before domestic tribunal are of a quasi-judicial character ; therefore, the minimum requirement of the rules of natural justice is that the Tribunal should arrive at its conclusion on the basis of some evidence, i.e. evidential material which with some degree of definiteness points to the guilt of the delinquent in respect of the charge against him. Suspicion cannot be allowed to take the place of proof even in domestic inquiries.” Mr. Maitra next contended that the enquiry report made by the Enquiring Authority was bad and erroneous and in violation of the principles of natural justice. It was erroneous as the money which had been deducted by the petitioner from the salaries of the employees for deposit in recurring deposits scheme with the Savings Bank was not Government money. It belonged to the employees concerned. It was in violation of principles of natural justice inasmuch as, a postal employee, as will appear from the records, was examined without informing the petitioner that the said witness would be called and examined nor any opportunity was given to the petitioner to cross-examine the said witness. It is not known to what extent the decision of the Enquiring Authority was affected by the evidence of the said witness.

5. The last contention of Mr. Maitra was that the second show-cause notice was bad. Firstly, as it was not in compliance with the liberty given by *Amiya Kumar Mookerji*, J. No. liberty was given by his Lordship to dismiss the petitioner when no such proposal was made by the Enquiring Authority, secondly, the punishing authority was not

entitled to inflict higher punishment than proposed by the Enquiring Authority unless it recorded its reasons for disagreeing with the proposal of the Enquiring Authority and no such reasons have been recorded as provided in Rule 10(12) of the West Bengal Services (Classification, Control and Appeal) Rules, 1971, which is mandatory. Secondly, as the purpose of the second show cause notice was not only to show cause against the proposed punishment but also to show cause against the reasons given by the Enquiring Authority and the punishment proposed by it. No opportunity, in the instant case, was afforded to the petitioner to show cause or to challenge the reasons given or the alleged facts purported to have been found by the Enquiring Authority against the petitioner. The disciplinary authority proceeded with a biased mind and on the basis of having accepted the findings of the Enquiring Authority and merely asked the petitioner to show cause why he should not be dismissed from his service. In support of his contention Mr. Maitra relied on the following decisions :—

(1) (5) *State of Assam v. Bimal Kumar Pandit*, reported in AIR (1963) SC 1612 here the Supreme Court observed as under :—

“In issuing the second notice, the dismissing authority naturally has to come to a tentative or provisional conclusion about the guilt of the public officer as well as about the punishment which would meet the requirement of justice in his case, and it is only after reaching conclusion in both these matters provisionally that the dismissing authority issues the second notice. The second opportunity enables the public officer to cover the whole ground and to plead that no case had been made out against him for taking any disciplinary action and then to urge that if he fails in substantiating his innocence, the action proposed to be taken against him is either unduly severe or not called for”.

(2) (6) *Union of India v. H.C. Goel*, reported in AIR (1964) SC 364. Here the Supreme Court after considering the facts and circumstances of the case observed as under :—

“Now, in this state of the evidence, how can it be said that the respondent even attempted to offer a bribe to Mr. Rajagopalan. Mr. Rajagopalan makes a definite statement that the respondent did not offer him a bribe. He merely refers to the fact that the respondent took out a paper from his wallet and the said paper appeared to him like a hundred rupee note double folded. Undoubtedly, Mr. Rajagopalan suspected the respondent's conduct and so, made a report immediately. But the suspicion entertained by Mr. Rajagopalan cannot, in law, be treated as evidence against the respondent even though there is no doubt that Mr. Rajagopalan is a straight-forward and an honest officer. Though we fully appreciate the anxiety of the appellant to root out corruption from public service, we cannot ignore the fact that in carrying out the

said purpose, more suspicion should not be allowed to take the place of proof even in domestic enquiries. It may be that the technical rules which govern criminal trials in courts may not necessarily apply to disciplinary proceedings, but nevertheless, the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as much to regular criminal trials as to disciplinary enquiries held under the statutory rules. We have very carefully considered the evidence led in the present enquiry and borne in mind the plea made by the learned Attorney-General, but we are unable to hold that on the record, there is any evidence which can sustain the finding of the appellant that charge of No. 8 has been proved against the respondent".

6. Mr. Sakti Prosad Mukherjee, learned Advocate appearing for the respondent contended that the disciplinary proceedings cannot be said to be wholly bad on the grounds as urged by Mr. Kashi Kanta Maitra nor can the enquiry report or the second show cause notice be said to be bad. The petitioner was given ample opportunity to prove his innocence and to disprove the charges made against him. There was no denial of any opportunity to the petitioner in that respect but if the law as enunciated by the Supreme Court and this court was in favour of the petitioner then in that event he is unable to add anything contrary thereto. The contentions of Mr. Maitra has great force.

7. In my opinion, the chargesheet was not issued by authority who was entitled to or empowered to issue the chargesheet on the date when the same was issued and therefore the same was bad and cannot be sustained. Admittedly there were certain charges which were based merely on suspicion and suspicion cannot be made a ground for charging a person with guilt. The money could not be termed as Government money inasmuch as the same was deducted by the petitioner from the salaries of the employees for deposit in the Savings Bank which belonged to the employees from whose salaries the same was deducted. Even the money while remaining with savings bank cannot and could not acquire the character of Government money and the Government could not claim any right, title and interest therein. No reason has been given by the disciplinary authority in accordance with the provisions contained in rule 10(12) of the West Bengal Services (Classification, Control and Appeal) Rules, 1971 as to the higher punishment sought to be inflicted on the petitioner. The fact that the witness who was examined by the respondents without informing the petitioner and without affording the petitioner any opportunity to cross-examine him vitiated the enquiry proceeding. The disciplinary authority proceeded with a biased mind as will be evident from the second show cause notice and in fact the petitioner was not given any opportunity to challenge

the findings of the enquiring authority. The second show cause notice also is, therefore, bad and cannot be sustained.

8. For all the above reasons the petitioner succeeds. The rule is made absolute. There will be no order as to costs.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Satil Kumar Dutta

Decision : July 14, 1978

Kinkar Chandra Hazra Appellant

Versus

Sudhir Chandra Ghosal & Ors. Respondents*

Resjudicata—Plea of—One Title suit and another Money suit affecting same property were instituted—Parties are the same—Rule against decision of appeal court arising out of money suit was discharged for default—Whether that Order of discharge would operate as a bar of resjudicata to hearing of second appeal arising out of Title suit—Interpretation.

The plaintiff filed a Title suit for declaration of his tenancy right in the suit property and for a declaration that the defendants had no right therein and for injunction. The plaintiff also instituted another Money suit for recovery of compensation for paddy on the allegation that the defendants had forcibly harvested the same from the suit land. Both the suits were heard analogously. The Money suit was dismissed on the ground that the plaintiff had failed to establish his title or possession in the suit lands. That finding was arrived at in both the suits and both the suits were disposed of by a common judgment. At the lower appellate court, the points for determination were on title and possession first and in considering the respective claims the court came to the finding that the plaintiff was not in possession of the suit lands nor was he ever in khas possession thereof and that he could not claim any tenancy right in respect thereof. A common judgment was passed governing both the appeals. Against the judgment and decree in the Money Appeal a Civil Rule was obtained but the said Rule was discharged for default and that order became final. There was Second Appeal against the decision arrived at in the Title Appeal. A question arose whether the order of discharge of the Civil Rule as made by the High Court would operate as a bar on the plea of resjudicata. In view of the Supreme Court decision reported in AIR 1970 SC 1, it is not possible to contend that there was no resjudicata.

The order of dismissal of the Money suit having been ultimately affirmed by the High Court was based on the finding that the plaintiff had no title or possession of the suit lands. These claims were also the

* *Appeal from Appellate Decree no. 1426 of 1966.*

basis of the prayer for a decree in the Title suit and if now this Title suit be decreed, such decree will be wholly inconsistent with the decree in the Money suit which is not permissible in law.

Cases referred to :—

(1) *Sukumar Ramchandra v. Krishnaji*, AIR 1970 SC 1

(2) *Sheodan Singh v. Daryao Kuwar*, AIR 1966 SC 1332

Bankim Chandra Dutt and Sudhir Kumar Dutt ... for the Appellant
Saktinath Mukherjee and Mrinal Kanti Das ... for the Respondents

The judgment of the Court was as follows :—

This appeal is against a decree of affirmance. The plaintiff appellant instituted Title Suit No. 5 of 1962 for a declaration of his title in tenancy interest in respect of Khas chedule land of the plaint and also for a further declaration that the defendants had no title therein and for permanent injunction restraining them from interfering with his possession of the suit lands. The plaintiff, it appears, also instituted Money Suit No. 12 of 1958 for a money decree for Rs. 444/- being the amount of compensation for paddy on the suit land which was alleged to have been forcibly harvested by the defendants. These two suits were heard analogously and the evidence, oral and documentary, is common in both the suits. Issue No. 3 of the Money Suit is as follows :—

“3. Is the plaintiff entitled to get any compensation ?

If so, for what amount ?”

The other relevant issues, being issues Nos. 5 and 6 of the Title Suit are as follows :—

5. Has the plaintiff alleged right, title and interest in respect of the suit property ?

“6. Is the plaintiff entitled to the declaration and permanent injunction as prayed for ?

2. The learned Munsif answered the issues 5 and 6 of the Title Suit in the negative. He further held that as the possession continued to be with the defendant No. 1, the money suit failed. In regard to issue No. 3 of the Money suit, the learned Munsif observed that in view of his above discussion “.....the plaintiff never possessed the suit lands in khas and therefore he is not entitled to any compensation from defendant No. 1”. Both the suits were accordingly dismissed.

3. Two appeals were preferred against two decrees which were based on the above common judgment and in the appeals heard analogously, the appellate court framed two points for determination which are as follows :—

“1. Has the plaintiff his alleged right, title and interest in the suit lands ? If so, is he entitled to the prayer for permanent injunction ?

2. Is the plaintiff entitled to get any compensation ? If so, for what amount ?”

4. The appellate court on point No. 1 held that the plaintiff was not in possession of the suit lands and he was never in khas possession thereof. To sum up, the plaintiff could not claim his tenancy right in the suit land and he was not entitled to a declaration of such right nor could he claim injunction being out of possession. As to point No. 2, the court observed that in the light of the above findings, as the plaintiff never possessed the suit land in Khas, he is not entitled to claim compensation for Rs. 444/- or any amount. As a result, the appeals were dismissed. Against the appellate decree arising from the Money Suit, the petitioner obtained a Rule being Civil Revision Case No. 3261 of 1965 and this Rule, it appears, was discharged for default on 4.12.74 and that order is now final.

5. Against the decision in the appeal out of the Title Suit, the plaintiff has preferred this present appeal.

6. Mr. Saktinath Mukherjee, learned Advocate for the defendant respondent No. 1 has submitted, in effect by way of preliminary objection, that the plaintiff's present appeal is barred by *resjudicata* in view of the decision in Civil Revision case arising out of the Money Suit. He submitted that the decree in the Money Suit is based on the finding that the plaintiff had no tenancy interest in the land as claimed nor was he in Khas possession of it and this finding has been affirmed by this Court in the said Civil Rule, though the Rule was discharged for default as already indicated. He referred to certain decisions of the Supreme Court to which I shall presently refer.

7. Mr. Bankim Chandra Dutt, learned Advocate appearing for the plaintiff appellant submitted that there was no finding on title in the Money Suit as the learned Munsif, while dismissing the Money Suit has simply relied on the findings arrived at in the Title Suit and similar was the position before the appellate court and in the Money Appeal. There was no question or occasion for making any finding on title in the money suit by the court which could be said to be *resjudicata* in the present appeal.

8. We have seen that the suits were heard analogously and the plaintiff's Money Suit was dismissed on the ground that he failed to establish his title or possession in the suit lands which was the finding arrived at in the Suits in the analogous hearing by the common judgment. In the appellate court we have seen that the points for determination were on title and possession first and in considering the respective claims the court on the materials before it came to a finding that the plaintiff was not in possession of the suit lands nor was he ever in khas possession thereof and he could not claim any tenancy right in respect thereof. These findings were arrived at by the Court in both the appeals and that was the reason why both the appeals were dismissed as the court found against the plaintiff on

all the relevant issues again by the common judgment. It is to be noted that this Court discharged the Rule in its revisional jurisdiction which as the Supreme Court has pointed out is only a made of exercising its general appellate jurisdiction as held in (1) *Sukumnr Ramchandra v. Krishnaji*, AIR 1970 SC 1 and the order of the appellate court becomes merged with the order made in revision so that the appellate order stands confirmed. The Supreme Court in (2) *Sheodan Singh v. Daryao Kuwar*, AIR 1966 SC 1332 observed :—

“.....Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal court will be *res judicata* and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial Court given on merits, and if that is so the decision of the appeal court will be *res judicate* whatever may be the reason for the dismissal.”

9. These observations squarely fit in with the events that took place in this appeal and in view of the above position, it is not possible to contend that there was no *res judicata*.

10. Mr. Dutt, learned Advocate has submitted that there is no question of inconsistent decree being passed, the prevention of which is one of the object of the principle of *res judicata*. It is difficult to appreciate this contention as the dismissal of the Money Suit ultimately affirmed by the High Court was based on the finding that the plaintiff had no title or possession of the suit lands. These claims are also the basis of the prayer for decree in the title suit and if now this title suit is decreed, such decree will be wholly inconsistent with the decree in the Money Suit which is not permissible in law.

11. In view of this position, this appeal fails and is dismissed.

There will be no order as to costs.

12. In view of above, the petition for production of additional evidence filed in court on 28.4.76 is rejected.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Nirmal Chandra Mukherji

Decision : August 10, 1978.

Sm. Etwari Oraon & Anr. ... (Plff.) Appellants.

Versus

Sri Amal Chandra Basu & Anr. ... (Deft.) Respondent.

Bengal Tenancy Act (8 of 1885), Sec. 49A(2) & 49-0(b)—Chapter VIIA—Notification issued by Local Govt.—Oraons of Barrackpur Sub-Division declared aboriginals by Notification—Transfer made by such aboriginal within one year prior to publication of notification, whether invalid—Permission of Collector not taken.

Civil Procedure Code—Or. 41, rule 27 – Remand—Scope of.

The important question involved in the instant case is whether by the Notification which was published on 7.11.57 and which declared that the Oraons of Barrackpore Sub-division within 24-Parganas could be treated as aboriginals and the provisions of Chapter VIIA of the Bengal Tenancy Act were applicable to them, would save a transfer dated 2.7.57, executed prior to the date of the said Notification and which admittedly made without any permission of the Collector as provided in Section 49F of the Bengal Tenancy Act.

HELD: Section 49A (2) of the Bengal Tenancy Act provides that the Local Government may declare by notification published in the Calcutta Gazette that the provisions of Chapter VII shall in any district or local area, apply to such of the following aboriginals, castes or tribes as may be specified in the notification and that such castes or tribe shall be deemed to be aboriginals for the purposes of the said Chapter. In the list of castes and tribes Oraons have been mentioned and by the notification in question Oraons of Barrackpore Sub-division have been described as aboriginals. Section 49-0 saves certain transfers. Section 49-0(b) is relevant for the present purpose. It provides that nothing in this Chapter shall affect the validity of any transfer (not otherwise invalid) by a tenure holder, raiyat or under raiyat of his tenure or holding or any portion thereof, made bonafide, in the case of other caste or tribe to which the said Chapter has been applied, atleast one year before the date of publication of the notification under section 49A, sub-section (2), in respect of such castes or tribes. Thus it is clear that the notification has retrospective operation for a period of one year. Beyond that period it has no retrospective operation and the transfers made beyond one year before the date of publication of the notification are saved, even though those transfers were made without the permission of the Collector. This being the clear meaning of section 49-0(b), there is no difficulty in holding that the instant transfer being dated 2.7.57 and the notification being dated 7.11.57 the transfer was made within one year from the date of the notification and

* Appeal from Appellate Decree no. 1599 of 1972.

as such, such a transfer without the permission of the Collector cannot be held to be treated as valid.

Cases referred to :—

- (1) *The Municipal Corporation of Greater Bombay v. Lala Pancham and Others*, AIR 1965 SC 1008.
 - (2) *Bishnu Dutt v. Ramji Prosad and another*, AIR 1920 Patna 56.
 - (3) *Jatindra Mohan Chakravarti and others v. Bijoy Chand Mahatab*, AIR 1924 Calcutta 396.
 - (4) *Jagadish Ch. Bose v. Baijnath Shaw*, AIR 1966 Calcutta 580.
 - (5) *Indrajit Pratap Sahl v Amar Singh & Ors.*, 50 Indian appeal 183
 - (6) *Brij Indar Singh v. Kanshi Ram and others*, 44 Indian Appels 218.
 - (7) *Indra Bhusan Saha and Ors. v. Janardan Saha and anr.*, 28 CWN 945.
 - (8) *Kamala Ranjan Ray v. Baijnath Bajoria* AIR 1951 SC 1
- Sakti Nath Mukherji and Sushanta Kundu* ... for the Appellants,
Subodh Kumar Bhattacharya ... for the Respondents

The judgment of the Court was as follows :—

This is an appeal from the judgment and decree passed by Shri L. M. Ghosh, Additional District Judge, 10th court, Alipore dated 27th June, 1972 in Title Appeal No. 551 of 1971 reversing those of Shri M. M. Mukherji, Munsif, Additional Court, Sealdah, 24-Parganas, dated 24th April, 1971 in Title Suit No. 96 of 1968.

2. The plaintiffs are the appellants in this Court. The plaintiffs brought a suit for declaration of title and permanent injunction. The plaintiffs' case is that the suit property measuring 26 decimals of land in C. S. Dag No. 888 of Khatian No. 5 of Mauza Pahara originally belonged to Birsa Oraon and Karu Oraon and their names have been recorded accordingly in the C. S. record of right. Birsa had a son named Hadra alias Gandru who predeceased him leaving plaintiff Nos. 1 to 3 and proforma defendant No. 3 as his heirs. Thereafter Birsa died leaving his wife Chumani and the plaintiffs and proforma defendant No. 3 as heirs. On the death of Chumani, the plaintiffs and proforma defendant No. 3 became the heirs in respect of the suit property. It is alleged that Birsa and Karu belonged to the aboriginals of Oraon tribes and by a notification No. 19722 L. R. dated 29th October, 1957 published in the Calcutta Gazette dated 7th November, 1957 it was declared that Oraons of Barrackpore Sub-division within the district of 24-Parganas were aboriginals and the provisions of Chapter VIIA of Bengal Tenancy Act were applicable to them. Next it is alleged that defendant No. 1 purchased the suit land by practising fraud and without the permission of the Collector and in contravention of the provisions of Chapter VIIA of the Bengal Tenancy Act by a kotala dated 2nd July, 1957 from the said Chumani Oraon and plaintiff no. 2 who was then a minor, without paying any consideration money. It is alleged that the said sale

is void in law and as such, the defendant no. 1 did not acquire any right, title and interest in the suit property nor he is entitle to enter into the suit land and disturb the plaintiffs' possession. Hence, the suit.

3. The defendant no. 1 alone contested the suit. His case is that Birsa was the real owner, but in the revisional settlement the name of the Karu, proforma defendant No. 2 had been wrongly recorded and as such he has no right, title and interest in the suit property. It is admitted that Birsa and Karu belonged to the aborginal tribe, but it is denied that by practising fraud he had purchased the suit property. It was further stated that Chapter VIIA of the Bengal Tenancy Act was not applicable to this case. Lastly, it is stated that a joint petition of compromise by the plaintiff No. 1 and defendant No. 1 was filed in court. The proforma defendant No. 2 filed a separate written statement supporting the plaintiffs' case. As regards the petition of compromise filed between the plaintiff No. 1 and defendant No. 1, the learned Munsif found that the plaintiff No. 2 who was contesting the suit and upon whom the right to sue survived along with plaintiff No. 1 on the death of plaintiff No. 2 did not sign the petition of compromise. The learned Munsif also on perusal of the petition of compromise found that the same was not in accordance with law. In the circumstances, the learned Munsif did not record the compromise and the petition of compromise was rejected on merits. The learned Munsif found that admittedly the vendor of the disputed property which the defendant No. 1 had purchased by a kobala (Ext. 1) were aboriginals. The defendant No. 3 (D.W.1) admitted in his cross examination that no permission was taken from the Collector at the time of purchasing the suit property. That being so, the transfer made on 2nd July, 1957 by Chumani Oraon and plaintiff No. 1 comes under the mischief of section 49G of the Bengal Tenancy Act, 1885 and the sale hold on the 2nd July, 1957 must be declared to be invalid in the eye of law. In that view of his finding the learned Munsif decreed the suit. Being aggrieved, the defendant No. 1 preferred an appeal before the learned District Judge. The appeal was heard by the learned Additional District Judge. Before the learned court of appeal below, on behalf of the defendants it was contended that the notification is dated 29th October, 1957 and the transaction in question took place on 2.7.57 and as such, according to the provisions of section 49A of the Bengal Tenancy Act, the provisions of Chapter VIIA would not apply in cases of transfer before notification. On behalf of the plaintiffs it was, on the other hand, contended that section 49-0 of the Act clearly lays down that the transfers which are made at least one year before the date of the publication of the notification under section 49A sub-section (2) will not be affected by such notification. The learned Judge found that apparently there is some conflict between section 49A and section 49-0 of the Bengal Tenancy Act. He was also of opinion that it was to be considered how a reconciliation

between the two sections could be brought about. Before the learned Judge an application was filed for filing additional written statement or for amendment by adding one paragraph to the effect that the land in suit is governed by the Non-agricultural Tenancy Act and not by Bengal Tenancy Act. Another application was filed under order 41 rule 27 of the Code of Civil Procedure for acceptance as additional evidence, the record-of-right. The learned Judge was of opinion that the defendants should be given a chance to file additional written statement and in that view of his finding the learned Judge set aside the judgment and decree passed by the learned Munsif and sent the case back on remand for giving chance to the defendant No. 1 for filing additional written statement. The learned Munsif was directed to accept the additional written statement if filed and after acceptance of the same the learned court was further directed to give chance to both the parties to adduce further evidence in support of their respective cases and then decide the matter in accordance with law. It was also ordered that per-chance the defendant does not file additional written statement, the learned Munsif will decide on the existing record as to whether the pre-notifications transferred will be hit by the provisions Chapter VIIA of the Bengal Tenancy Act and then dispose of the matter. Being aggrieved by the aforesaid judgment passed by the learned Additional District Judge, the plaintiffs have come up to this Court.

4. Mr. Sakti Nath Mukherji, learned advocate appearing on behalf of the appellants, in the first place, contends that the only question that was passed before the learned Judge was whether the transfer which was made before the date of notification would be saved, or the same would be hit by the provisions of the Bengal Tenancy Act as, admittedly no permission for such transfer was obtained from the Collector. The learned Judge without coming to any decision on the said point allowed the defendant to make out a new case, namely, that the suit land is governed by Non-agricultural Tenancy Act and not by Bengal Tenancy Act. The learned Judge was conscious of the fact that in the original written statement no such plea was raised. In the application under order 41 rule 27 the defendant No. 1 wanted to have the record-of-rights admitted as an additional evidence on the ground that in the record-of-right there is a note like "dakhal basat". This recording, according to Mr. Mukherji, does not at all show that the land in suit is governed by the Non-agricultural Tenancy Act. The only contention that was raised in the trial court was that Chapter VIIA of the Bengal Tenancy Act was not applicable. Mr. Mukherji very much challenges the order of remand. It is contended by Mr. Mukherji that there was absolutely no reason for the learned Judge to allow defendant No. 1 to make out a completely

different case only when it was noticed by defendant No. 1 that provisions of section 49-0 of the Bengal Tenancy Act do not save the transfer in question and a new plea on the ground that the suit land is governed by the Non-agricultural Tenancy Act was sought to be introduced. In this connection, Mr. Mukherji further submits that additional written statement cannot be allowed to be filed after the plaintiff has closed his evidence. It is true that amendment of written statement in suitable cases can be allowed to be made, even at a late stage. But that is not so in the case of additional written statement. In support of his contention that the learned court of appeal below ought not have accepted additional evidence Mr. Mukherji first refers to a decision reported in (1) AIR 1965 Supreme Court 1008 (*The Municipal Corporation of Greater Bombay v. Lala Pancham and others*). It has been held in this case that "under order 41 Rule 27 the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a *lacuna* in the evidence that the appellate Court is empowered to admit additional evidence". It was further held that the power under clause (b) of sub-rule (1) of Rule 27 of Order 41 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision. If the documents on record are relevant on the issue of fraud the Court could well proceed to consider them and decide the issue. But the appellate Court cannot order a fresh trial. Such a course is not permissible under Order 41 Rule 27, Civil Procedure Code, when it has not proceeded under Order 41 Rule 25 or remanded the case under Order 41 Rule 23." Mr. Mukherji next relies on a decision reported in (2) AIR 1920 Patna 56 (*Bishnu Dutt v. Ramji Prosad and another*). In this case it has been held that "the rule is that if the trial has not been proper owing to some neglect on the part of the Court, the appellate Court has power to remand the case, but where the neglect or default is on the part of a party to the litigation, the appellate Court has no such power." Mr. Mukherji also seeks reliance on a Bench decision of this Court reported in (3) AIR 1924 Calcutta 396 (*Jatindra Mohan Chakravarti and others v. Bijoy Chand Mahatap*). In this case it has been laid down "where the plaintiff does not produce the evidence that is necessary to establish his right in the trial Court, he cannot ask for a remand in order to prove this fact by new evidence at appellate stage of the proceedings".

5. Mr. Subodh Kumar Bhattacharya, learned advocate appearing on behalf of the respondents, in the first place, contends that such an order of remand is not appealable. He also contends that the learned court below was right in accepting the additional evidence under Order 41 Rule 27 of the Code. In support of his contention he refers to the decisions reported in (4) AIR 1966 Calcutta 580 (*Jagadish Ch. Bose v. Baijnath Shaw*) ; (5) 50 Indian Appeals 183 ; (6) 44 Indian Appeals 218 (*Brij Indar Singh v. Kanshi Ram and others*) ; (7) 28 CWN 945 (*Indra Bhusan Saha and ors. v. Janardan Saha and anr.*) ; and (8) AIR 1951 Supreme Court 1. On going through these decisions and also considering the decisions referred to by Mr. Mukherji, I am of opinion that the learned Judge was not right in setting aside the judgment and decree passed by the learned Munsif and sending the case back for a fresh trial. The order of remand, in the circumstances stated before, cannot be supported and must be held to be illegal. It now remains to be seen whether by the notification which was published on the 7th November, 1957 and which declared that the Oraons of Barrackpore subdivision within the district of 24 Parganas would be treated as aboriginal and the provisions of chapter VIIA of the Bengal Tenancy Act were applicable to them would save a transfer dated 2nd July, 1957, that is prior to the date of notification and which admittedly was made without any permission of the collector as provided in section 49-F of the Bengal Tenancy Act. Section 49A(2) provides that the local Government may declare by notification published in the Calcutta Gazette that the provisions of chapter VII shall, in any district or local area, apply to such of the following aboriginals, castes or tribes as may be specified in the notification and that such caste or tribe shall be deemed to be aboriginals for the purposes of this chapter. In the list of castes and tribes Oraons have been mentioned and by the notification in question Oraons of Barrackpore Sub-Divisions have been described treated as aboriginals. Section 49-0 saves certain transfers. Section 49-0 (b) is relevant for our present purpose. It provides that 'nothing in this Chapter shall affect the validity of any transfer (not otherwise invalid) by a tenure holder, raiyat or under raiyat of his tenure or holding or any portion thereof, made bona-fide, in the case of other caste or tribe to which this Chapter has been applied, at least one year before the date of the publication of the notification under section 49-A, sub-section (2), in respect to such castes or tribes'. Thus, it is clear that the notification has retrospective operation for a period of one year. Beyond that it has no retrospective operation and the transfers made beyond one year before the date of the publication of the notification are saved, even though those transfers were made without the permission of the Collector. This being the clear meaning of Section 49-0(b), I have no hesitation to hold that the present transfer being dated 2nd July, 1957 and the notification being

7th November, 1957 the transfer was within one year from the date of notification and as such, such a transfer without the permission of the Collector cannot be held to be treated as valid. In such circumstances, I am of opinion that the decree passed by the learned Munsif must be affirmed.

6. In the result, the appeal is allowed on contest. The judgment and decree passed by the learned Additional District Judge are set aside and those of the learned Munsif are restored. There will be, however, no order for costs in this appeal. In view of the judgment passed in the appeal, no separate order need be passed on the alternative application. Let the records go down early.

P. R.

[CIVIL APPELLATE JURISDICTION]

*Before Mr. Justice Chittatosh Mookerjee and Mr. Justice
Bankim Chandra Ray*

Decision : September 12, 1978

Lional Edwards Ltd. & Anr. ... Appellants

Versus

Labour Enforcement Officer & Ors. ... Respondents*

Contract Labour (Regulation and Abolition) Act (37 of 1970), Sec. 2(1) (e)—'Place'—Meaning of—Whether Ship at port is a place where industry etc are carried on—Establishment—Central Government, whether appropriate authority—Sec. 34—How difficulties felt in implementation of provisions of Act can be removed.

In these appeals, the appellants have challenged, inter alia, the enforcement of certain provisions of the Contract Labour (Regulation and Abolition) Act 1970 against the appellants in respect of any of their vessels or any office or establishment or alleged establishment.

HELD: The expression "place" is a word of indefinite import. In the context of the Contract Labour (Regulation and Abolition) Act 1970, the expression, 'Place' means 'the three-dimensional compass of a material object'. An object for the time being covering the surface and where industry trade, business, manufacture or occupation is carried on will be a place under section 2 (1)(a)(1)(ii). A ship in a port is for the time being stationary and occupies a definite place covering the surface of the earth covered by water. A ship undergoing major repairs may be even placed in a dry dock. The appellants either as principal or as agent may carry on shipping business. Loading and unloading of a ship, engagement of watchmen of ships, cargo or employment of contracts for major and

*F. M. A. nos. 1, 28 and 131 of 1977.

minor repairs of a ship would be parts of the shipping business carried on by the appellants. A ship in a port would be a work site and the workmen employed for such loading and unloading of the cargo, security repairs to the ship would be all in connection with the business or trade of the appellants

The only question here is whether a ship while it remains anchored or berthed in a port is a place so as to come within the ambit of the definition of "establishment" as given in section 2(1)(e) of the Act. A stationary ship occupying a part of the space is a place within the meaning of section 2(1)(e)(ii) of the Act. There may be some defects as indicated by the learned counsel of the appellants in the different sections of Chapter V of the Act but such defects, if any, cannot be a ground for totally excluding a ship in a port from the ambit of the definition 'establishment' given in the said Act.

Section 34 of the Act provides that if any difficulty arises in giving effect to the provisions of the Act the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of the Act, as appears to it to be necessary or expedient for removing the difficulty. Therefore, in case the Act otherwise applies to the appellants they may approach the Central Government for removal of difficulties in applying some of the provisions of the Act to their ships.

In fine, a ship is a place where industry, trade or business is carried on. The said work site being situated in major port prima facie the Central Government would be the appropriate Government, within the meaning of the Act.

Cases referred to :—

(1) *M/s. Gammon India Ltd. v. Union of India & Others*, AIR 1974 SC 960

(2) *Harrisons and Crossfield Ltd., Quilon v. Municipal Council Kottayam*, AIR 1958 Kerala 69 at Page 71

Arijit Chowdhury and Rupen Mitra ... for the Appellants in F.M.A no. 1/1977

P. P. Ginwalla, Arijit Chowdhury, Rupen Mitra, ...

and P. K. Bose ... for the Appellants in F.M.A. No. 131/1977

A. Chowdhury, R. Mitra, P. K. Bose ...

and Sukumar Sen ... for the Appellants in F.M.A. No. 28/1977

D. N. Das and Mrs. Archana Sengupta ... for the Respondents

The judgment of the Court was as follows :—

Mookerjee. J.: These appeals have been preferred against the judgment of his Lordship Mr. Justice Murari Mohan Dutt discharging the three Civil Rules obtained by the three sets of appellants inter-alia, challenging the enforcement of the provisions of the Contract Labour (Regulation and Abolition) Act, 1970, against the appellants in respect

of any of their vessels or any office or establishment or alleged establishment. The appellants of F.M.A. No. 131 of 1977 and F.M.A. No. 1 of 1977 are said to be the owners of ships and their ships carry cargo and passengers between various ports and in course of their voyages their ships call at various ports of India including Calcutta. The appellant No. 1 in F.M.A No. 28 of 1977 is a steamer agent at Calcutta of the American Export Lines Incorporated. The appellant No. 2 is the Shipping Manager of the appellant No.1. The ships of the principal of the appellant No. 2 from time to time call at the port of Calcutta. The Registering Officer and the Assistant Labour Commissioner, (Central), Government of India, Ministry of Labour and Employment, Office of the Regional Labour Commissioner, Calcutta had served notices upon each of the appellants stating that with effect from 10th February, 1971 all the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 had come into force. The Central Government had fixed 31st December, 1972 as the date before which every principal employer of an establishment to which the Act applied shall make an application to the said Registering Officer for registration of the establishment. The Registering Officer by his said letter advised the appellants to take necessary action to get their establishments registered forthwith or to show-cause within 7 days as to why legal action should not be taken against them under the said Act. The appellants had written separate letters to the Registering Officer *inter alia* contending that the said Act was not applicable to them and as such registration of their establishments was not required under the Act. There was further correspondence between the parties. Thereafter, the appellants had filed writ petitions in this Court and three Rules were issued. As already stated, M.M. Dutt, J. discharged the said Rules and against the said judgment these appeals have been preferred.

2. The preamble of the Contract Labour (Regulation and Abolition) Act, 1970 states that it is an Act to regulate the employment of contract labour in certain establishments and to provide for their abolition in certain circumstances and for matters connected therewith. Sub-section (4) of Section 1 provides that the Act shall apply :—

(a) to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour ;

(b) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen.

Under the proviso to said sub-section the appropriate government has been authorised to apply the provisions of the Act to establishments and contractors employing such number of workmen less than twenty as may be specified. Sub-section (5) of Section 1 excludes application of the said Act to establishments in which work only of an intermittent or casual

nature is performed. Under clause (b) of sub-section (5) of section 1 the appropriate government may decide the question whether work performed in an establishment is of an intermittent or casual nature and its decision shall be final. Explanation to sub-section (5) specified the work which shall not be deemed to be of an intermittent nature. Section 2(1) (c) of the Act contains the following definition of the expression "establishment" :—

- (i) any office or department of the Government or a local authority, or
- (ii) any place where any industry, trade, business, manufacture or occupation is carried on.

3. Mr. Ginwalla learned advocate for the appellants, has submitted before us that none of the appellants has an establishment within the meaning of the Act. The ships owned by the appellants of F.M.A.No. 28 of 1977 and F.M.A. No.1 of 1977 and the ships of which the appellant No. 1 of F.M.A. No. 28 of 1977 is the Agent cannot be treated as the establishments within the meaning of the Act. When their ships are in port, their cargo are unloaded, and loaded and generally various works have to be carried out on the said vessels. Such work, apart from loading and unloading of cargo include, repairs, keeping watch, supplying fuel and stores etc. The work of loading and unloading of the cargo is normally carried out by stevedors who for the purpose employ workers registered by the Dock Labour Board under the Calcutta Dock Workers (Regulation of Employment) Scheme, 1956. The work of repairs is normally entrusted to ship repairing companies and petty repairs are carried out by the labours engaged by contractors. According to the appellants such workers are not of a permanent but of an intermittent nature and such works are carried out actually on Board or in the neighbourhood of a vessel in the premises which are under the control and management of the Calcutta Port Trust.

4. Mr. Ginwalla submitted that a ship in a port of call cannot be considered a "place where industry, trade, business, manufacture or occupation is carried out". A Ship while in a port may occupy a place but the ship itself is not a place. Mr. Ginwalla has further submitted that the expression "place" within the meaning of Section 2(1)(c)(ii) connotes a stationary place and not a moving thing like a ship Mr. Ginwalla has submitted that Chapter-V of the Act contains certain provisions for the welfare and health of contract labour. In a moving thing like a ship not having a fixed location, it would be impossible to provide the said facilities for contract labour. Mr. Ginwalla ; the learned advocate for the appellants, has also submitted that in relation to the appellants the Central Government was not the appropriate government; within the meaning of section 2(1) (a) of the contract Labour (Regulation and Abolition) Act, 1970. Mr. Das, learned advocate for the respondents, has contested the above proposition of law urged on behalf of the appellants. But, the stand taken by the respondents

But, the stand taken by the respondents in these appeals is slightly different from their stand in the trial court. The respondents in paragraph (4) of their affidavit-in-opposition affirmed by P. P. Kanthan 3491(w) of 1974 submitted that the establishments of the petitioners of the three Civil Rules were permanent in nature and when their ships arrived at the Calcutta Port the work of loading and unloading of cargo, shifting of vessels from one berth for repairs and arranging for supplying fuel and stores were being carried on by labourers employed by their contractors. The watchmen employed in their vessels were also engaged through contractors. The said deponent in paragraph (9) of his affidavit-in-opposition stated "I say that the ship is not a place of business but the work carried on in the ship on behalf of the establishment would be treated as the establishments work on the site. I further say that the work site is an establishment and the works at the site are being carried on under the supervision and control of the petitioner's establishment through the contract labour received the payment either directly or through contractors". The deponent in the said paragraph (9) further contended that the establishment of each of the petitioners is projected into three ships when they came to the Calcutta Port. Mr. Das, learned advocate for the respondents, had submitted that the ships either in respect of which the appellants are owners or agents while berthed in Calcutta Port would be establishments within the meaning of Section 2(1)(e) of the Act.

5. The Supreme Court in (1) *M/s. Gammon India Ltd. v. Union of India Others*, AIR 1974 SC 960, upheld the validity of the Contract Labour (Regulation and Abolition) Act, 1970. The petitioners in *M/s. Gammon India Ltd.* carried on business of contractors for construction of buildings, way-bridges and dams. They had contended that the contractors within the definition of the Act and the workmen employed by them were not contract labour because they were not employed in connection with the work of the establishment. According to the petitioners, the work of the establishment is not only at the place where the business, trade or industry of the establishment is carried on but also the actual business, trade or industry of the establishment. They placed reliance on the words "work of any establishment" in Section 2(B) of the Act. By way of illustration it was said that if a banking company which is an establishment is carried on its business at Delhi employed the petitioners to construct a building at Allahabad, the building to be constructed is not the work of the bank. It was said that the only work of the bank as an establishment is banking work and, therefore, the work of construction of the building was not the banking work of the establishment. Therefore, the petitioners contended that the workmen employed by them were not workmen in connection with the work of the establishment. The Supreme Court rejected the said contentions of the petitioners

as unsound. According to the Supreme Court, when the banking company employed the petitioners to construct a building, the petitioners were in relation to the establishment contractor who undertook to produce a given result in the bank through contract labour. To accede to the petitioner's contention that the construction work which is away from the place where the industry, trade, business of the establishment is carried on is not the work of the establishment is to render the words "work of the establishment" devoid of ordinary meaning. The construction of the building is the work of the establishment. The building is the property of the establishment. That is why a workman is deemed to be employed as contract labour in connection with the work of establishment. The place where business or trade or industry or manufacture or occupation is carried on is not synonymous with "the work of the establishment" when a contractor employs contract labour in connection with the work of the establishment. The error of the petitioners lies in equating the work of the establishment with the actual place where the business, industry or trade is carried on and the actual work of the business, industry or trade. The Supreme Court in paragraph (13) of its judgment proceeded to hold that the site chosen for the building is the work site of the establishment. The work site is the place where on completion of construction, the business of the establishment will be carried on. Therefore, the work at the site is understood in the definition is the work of an establishment. Establishment is understood as including the work site. The Supreme Court in *M/s. Gammon India Ltd. v. Union of India & Others* (*supra*), also considered the scope and effect of the different sections of the Contract Labour (Regulation and Abolition) Act, 1970 and the Central rules made thereunder. The Supreme Court held that the said Act was an *intravires* piece of legislation. The Contract Labour (Regulation and Abolition) Act, 1970 has not given any definition of the word "place". Therefore, in interpreting the said term the court may consider the intention of the legislature by reference to the context and the object and purpose of enacting the aforesaid Act. The Supreme Court in *M/s. Gammon India Ltd. v. Union of India & Others* (*supra*), observed that the condition of contract labour had been engaging the attention of various committees for a long time. The benefits conferred by the said Act and the Rules are social welfare legislative measure. The preamble of the Act states that it has been enacted to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances. Therefore, in interpreting the expression "place" occurring in Section 2(1)(e), above facts and circumstances should be borne in mind.

6. The expression "place" is a word of indefinite import "which can cover anything from a pin-head to the universe according to the context in which it is used. (vide observations of the Full Bench of the Kerala High Court in (2) *Harrisons and Crossfield Ltd., Quilon v. Municipal*

Council Kottayam, AIR 1958 Kerala 69 at page 71), In the context of the Contract Labour (Regulation and Abolition) Act, 1970 the expression "place" means "the three-dimensional compass of a material object" (vide Webster's 7th New Collegiate Dictionary). Any object for the time being covering the surface and where industry, trade, business, manufacture or occupation is carried on would be a place under Section 2(1)(a) (1)(ii). A ship in a port is for the time being stationary and occupies a definite place covering the surface of the earth covered by water. A ship undergoing major repairs may be even placed in a dry dock. The appellants either as principal or as agent may carry on shipping business. Loading and unloading of a ship, engagement of watchman of ship's cargo or employment of contractors for major and minor repairs of a ship would be parts of the shipping business carried on by the appellants. A ship in a port would be a work site and the workmen employed for such loading and unloading of the cargo, security, repairs to the ship would be all in connection with the business or trade of the appellants.

7. It is not relevant that a ship may move from one port to another port of call because we are not required to consider whether a moving ship while on motion is a establishment or not. The only question is whether a ship while it remains anchored or birthed in a port is a place so as to come within ambit of the definition "establishment" given in Section 2(1)(e) of the Contract Labour (Regulation and Abolition) Act, 1970. In our view, the learned Single Judge rightly held that such a stationary ship occupied a part of the space and there was no reason why such a ship cannot be said to be a place under Section 2(1)(e)(ii) of the Act. Mr. Ginwalla, learned advocate for the appellants, submitted that it would be impossible for the owners or agents of a ship to make provisions for welfare and health of the contract labour specified in the different sections of Chapter-V of the Contract Labour (Regulation and Abolition) Act, 1970. The docks in which a ship may be birthed is controlled by the Port Authorities and the ship owners, agents would be unable to provide for example facilities for canteens rest-rooms etc. In our view, the alleged defects cannot be ground for totally excluding a ship in a port from the ambit of the definition 'establishment' given in the above Act. The Section 34 of the Act provides that if any difficulty arises in giving effect to the provisions of the Act, the Central Government may, by order published in the official gazette, make such provisions not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for removing the difficulty. Therefore, in case the Act otherwise applies to the appellants they may approach the Central Government for removal of difficulties in applying some of the provisions of the Act to their ships.

8. We may also refer to the sub-sections (4) and (5) of Section 1 of the said Act which lays down the extent of the application of the Act. The

applicability or otherwise of the Act would depend on two points. First, it must be an establishment of a nature specified in the Act. Secondly, the work carried on must not be intermittent or casual in nature. The explanation to sub-section (5) of Section 1 of the Act itself explains what kind of work performed in an establishment shall not be deemed to be of intermittent and seasonal in character. Sitting in writ jurisdiction we are not prepared to decide whether the works performed by workmen employed in a ship while lying in a port are intermittent in nature and seasonal in character. Under-Section 1(5)(b) "If a question arises whether work performed in an establishment is of an intermittent or casual nature, the appropriate Government shall decide that question after consultation with the Central Board or, as the case may be, a State Board, and its decision, shall be final. None of the appellants has as yet applied to the appropriate Government for deciding whether the works carried on in their establishment are only of an intermittent or casual in nature. The same would be also a mixed question of fact and law. Therefore, although we do not propose to interfere at this stage the order passed in these appeals would be without prejudice to the rights of the appellants to apply to the appropriate Government for adjudication in terms of Section 1(5)(b) of the Act. We also keep open the question relating to the nature of the work performed in the ships in respect of which the appellants are owners or agents and also the question relating to the duration of such works.

9. We have found that a ship in a port is a place where industry, trade or business etc. is carried on. The said work site being situated in a major port *prima facie* the Central Government would be the appropriate Government.

10. For the foregoing reasons, we dismiss these appeals without any order as to costs.

11. We, however, stay the operation of our judgment for four months. This decision, however would be without prejudice to the rights and contentions of the parties in proceedings, if any, under Section 1(5)(b) of the Act for adjudicating whether the works performed in the appellant's establishments were of intermittent or casual nature.

Ray, J. : I agree.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Anil Kumar Sen and Mr. Justice

B. C. Chakraborti

Decision : September 11, 1978

Sibdas Dutta

...

...

...

Appellant

Versus

Nirmal Chandra Dutta & ors.

...

...

Respondents*

Probate, grant of—Onus on propounder to prove the will—Requirements—Whether registration of a will is a proof of its genuineness—False recitals in the will—Unusual and unnatural disposition—Non-examination of important witnesses.

Plaintiff appellant instituted a suit in the Alipore Court for grant of probate in respect of two wills executed by his mother in respect of different items of properties. The testatrix had four sons and six daughters. By the wills she did not bequeath any property to her daughters and therein she mentioned that the daughters were well off, when actually they were not. Three of the daughters contested the suit contending that the wills were not genuine were procured by the plaintiff without letting the testatrix know the contents thereof and that the wills contained false recitals. On consideration of the evidence adduced by the parties, the Trial Court found that there were suspicious circumstances, it held that the wills were not genuine and valid documents and dismissed the suit. Plaintiff preferred an appeal to the High Court and contended that there was no suspicious circumstance, that the wills were duly executed and registered, that when wills were registered they should be considered as genuine and that if the execution of the wills be satisfactorily proved, the fact that the testatrix had not bequeathed any property to some of her children could not make the will invalid.

HELD : The genuineness of the will has not been satisfactorily proved. The testatrix did not comprehend the nature and import of the disposition. When the testatrix did not understand the implication and nature of the document which she was admitting, the fact that it was registered is inconsequential. The wills contained certain false recitals, the disposition was rather unusual in character and that though this may not by itself be a sufficient ground to invalidate the will, yet read in the context of the falsity of the recitals to justify the unusualness, it assumes a suspicious character. Some very vital and important witnesses have not been examined. The onus that lay on the propounder has not been satisfactorily discharged. The appeal accordingly fails.

Cases referred to :—

(1) *Sashi Kr. v. Subodh Kr.* AIR 1964 SC 529

(2) *H. Venkatachala Iyengar v. B. N. Thimmajamma*, AIR 1959 SC 443

*F. A. No. 144 of 1977.

- (3) *Sourendra Pal v. Saraswati Aurora*, AIR 1974 SC 1999
 (4) *Rant Purnima Debi v. Kr. Khagendra Narayan*, AIR 1962 SC 567
 (5) *Harmes v. Hinkson*, AIR 1946 PC 156
 (6) *Sarat Kumari Debi v. Raj Sakhi Chand Bahadur*, AIR 1929 PC 45
 (7) *Sushila Debi v. Pandit Krishna Kumar*, AIR 1971 SC 2236
P. N. Mitter, Sourindra Nath Mukherjee, Hrishikesh Ghosh and Partha Datta for the Appellant
Manindra Nath Ghosh, Mukul Gopal Mukherjee and Tapendra Nath Basu for the Respondents Nos. 4, 7 & 9

The judgment of the Court was as follows :—

Chakraborti, J. :—This is an appeal by the plaintiff against a decree of dismissal passed in O.C. Suit No. 7 of 1976 of the 6th Court of Addl. District Judge, Alipore.

2. The plaintiff-appellant instituted the above suit for grant of probate in respect of two wills allegedly executed by his mother, one on 27.12.1963 and the other on 18.3.1968 in respect of different items of properties. The case of plaintiff briefly is as follows :—

3. The two wills, one relating to 89 Dilkhusa Street and the other relating to 91 Dilkhusa Street were the last wills executed by Uttama Debi, mother of the plaintiff. The plaintiff has been nominated as the executor in both the wills. The wills were duly executed and attested. She died on 17.1.1973 leaving four sons, Nirmal, Narendra, Chandi and Shibdas (plaintiff) and six daughters Bindubasini, Subhasini, Pravabati, Ashalata, Padmabati and Lili Dutta. The plaintiff as executor applied for grant of probate in respect of both the wills.

4. Defendant No. 4 Bindubasini resisted the claim by filing a written statement. Her case is that the wills are not genuine documents that Uttama Dutta was a pardanashin and illiterate woman and the wills were procured by the propounder without letting her know the contents thereof, that the wills contain false recitals and seek to extend substantial personal benefits to the propounder and that the wills were not free acts of a capable and conscious testatrix.

5. Defendants 7 and 9, Ashalata Bose and Lily Datta also filed a joint written statement almost in the same lines as above. On these pleadings the following issues were settled for decision :—

- (1) Are the wills in question genuine and valid documents ?
- (2) Were the wills duly executed and attested according to law ?
- (3) Had the testatrix sound disposing mind at the time of execution of the wills ?
- (4) Is the plaintiff entitled to get grant of the probate of the wills ?
- (5) What relief, if any, is the plaintiff entitled to ?

6. Ext. 1a is the will dated 27.12. 1963 and Ext. 1 is the later will dated 18.3.1968. the former relating to 89 Dilkhusa Street and the latter to 91 Dilkhusa Street. Ext. 1 (b) is another will dated 27.12. 1963 in

respect of certain properties at Agarpara in favour of Lily Datta. All the three wills appear to have been registered on the same date namely March 21, 1968. By a subsequent deed of gift, the properties covered by the 3rd will, were gifted to Lily Datta (Ext. 3A dated 3.5. 1968). Besides wills Uttama Datta appears to have disposed of various other properties, by different documents, between 1961 and 1968. Ext. 3(b) is a registered arpannama dated 25.1.1961, in respect of the residential house at 40, A, B & C Kareya Road, Calcutta dedicating the property to Sri Sri Siva. Ext. C and C1, both dated 11.9.1961 are registered deeds of gift in respect of half share each of 72B, Park Street and 6A Meher Ali Road. The donee is Shibdas Datta, the plaintiff. Ext. 1a, one of the disputed wills, is in favour of Nirmal Chandra Datta and Chandi Charan Datta. Ext. 1, the other will is in favour of Shibdas Datta. Ext. 3 is a deed of gift in favour of Lily Datta in respect of certain properties in mouja Tarapukur. Ext. 2 dated 28.3.1969 is a deed of relinquishment by Uttama Datta of the office of Sebait in favour of her four sons. These are the principal documentary evidence adduced in the suit.

7. Besides the documentary evidence, several witnesses were examined on both sides. P.W. 1 is the propounder himself. P.W. 2 Sushil Kumar Ghosh is a nephew of Uttama Datta and cousin of the contesting parties. He is an attesting witness to Ext. 1 and the deed of relinquishment, Ext. 2. P.W. 3 Sasanka Bhowmick is an attesting witness to the other will Ext. 1a.

8. D.W. 1 is Bindubasini. D.W. 2 is Asba Bose and D.W. 3 is Lily Datta. The three D.W. s who are none other than the contesting defendants, have all stated in one voice that the wills are not genuine documents and that the brothers managed to procure the same from their mother Uttama without letting her know the purport and implications of the documents she executed.

9. Upon a consideration of the evidence on record, the Ld. Judge found that Uttama had a sound disposing mind, that initial evidence of execution and attestation were adduced but that there were as many as ten items of suspicious circumstances surrounding the execution of the will which could not be reasonably explained by the propounder. The suspicious not having been dispelled, the Ld. Judge found in the ultimate analysis that the wills were not genuine and valid documents. The suspicious circumstances found by the Ld. Judge may be enumerated thus :—(1) The wills contain false recitals as to the financial status of the daughters. It was found that all the daughters, with the exception of Lily Datta were receiving financial assistance from Uttama but in the wills they are said to be happily married and well placed in life. (2) The propounder derived substantial benefits from Ext. 1 and he took active part in the matter of execution of this as also

the other will. (3) The evidence indicates that the wills were neither read by Uttama nor read out to her. (4) The lawyer who prepared the wills allegedly under instructions from Uttama, though available was not examined. (5) There is an admission by PW I Sibdas that his mother executed other wills both before and after the two wills in question. (6) There is evidence that Uttama executed a will in 1963 in favour of Lily Datta and there is no reason why she would discriminate in favour of one daughter only without any apparent justification. (7) There is no mention in the second will Ext. 4 that another will was previously executed. (8) The other attesting witnesses to Ext. 4, and 1a have not been examined. (9) A portion of Ext. 1a is not proved to have been duly attested. (10) The suspicious nature of the signature of Uttama in the Exts. 1 and 1a indicating an inroad upon the endorsements which were admittedly written not at the time of execution and attestation.

10. On such findings the Ld. Judge dismissed the suit. Hence the appeal.

11. Mr. Mitter appearing for the appellant argued that most of the circumstances enumerated by the Ld. Judge are not suspicious at all, that the Ld. Judge has jumbled up the evidence and read the evidence of one into the other resulting in confused and erroneous findings, and that Uttama had the right to choose to show and bestow her favour and no grievance can be made of the fact that the bequest might with justice have been made in a different manner.

12. In an application for grant of probate the propounder is required to prove the will. What the requirements are to discharge the onus of proof is now well settled. In the case of (1) *Sashi Kr. v. Subodh Kr.* reported in AIR 1964 SC Page 529 it has been observed that the mode of proving the will does not ordinarily differ from that of proving any other document except as to the special requirements of attestation prescribed by section 63 of the Succession Act. In the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. In the case of (2) *H. Venkatachala Iyengar v. B. N. Thimmajamma*, reported in AIR 1959 SC page 443 it has been observed that there is one important feature which distinguishes a will from other documents namely that the will speaks from the death of testator so that when it is propounded before a Court, the testator who is no longer available cannot say whether it is his will or not. The propounder, therefore, is called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document of his

own free will. It is further laid down that on proof of the signature of the deceased or his acknowledgement that he has signed the will, he will be presumed to have known the provisions of the instrument he has signed. But the said presumption is liable to be rebutted by proof of suspicious circumstances. The presence of suspicious circumstances naturally tends to make the initial onus very heavy and calls up on the propounder to satisfactorily explain the circumstances. It would be a part of the initial onus to remove such suspicious and legitimate doubts in the matter. The same principle has been laid down in the case of (3) *Surendra Pal v. Saraswati Aurora*, AIR 1974 SC page 1999.

13. Besides these decisions Mr. Mitter appearing for the appellant also referred to the case of (4) *Rani Purnima Debi v. Kr. Khagendra Narayan* AIR 1962 SC page 567 which lays down that if a will has been registered that should be considered as a circumstance which may, having regard to the circumstances prove its genuineness. Mr. Mitter also made a grievance at the initial stage that the learned Judge from the very start has tried to smell suspicion where there is really none and has looked upon everything with disbelief. This certainly is not a proper approach. In the case of (5) *Harmes v. Hinkson*, AIR 1946 P.C. page 136, it is observed that where a will is "charged with suspicion the rules enjoin a reasonable scepticism and not an obdurate persistence in disbelief".

14. Bearing these guide lines in mind, the evidence may now be looked into. Ext. 1a dated 27.12.1963 is the earlier will in respect of 89 Dilkhusa Street, the legatee being Nirmal Chandra Datta and Chandi Charan Datta, two of the sons of the testatrix Uttama Debi. Ext. 1 dated 18.3.68 is the will in favour of the propounder Shibdas in respect of 91 Dilkhusa Street. The attesting witnesses to Ext. 1a are Gouranga Behari Bose, husband of a daughter of Uttama named Padmabati, Manasha Charan Datta husband of the testatrix and Sashanka Kr. Bhowmick a neighbour. The witnesses to Ext. 1 are Sushil Kr. Ghosh and Manik Kr. Ghosh both cousins of the propounder and the contesting parties. The recitals in the two wills are more or less identical. It is stated that she had grown old in age that the properties covered by the wills were acquired from her Stridhan assets, that the testatrix has four sons and six daughters, that the daughters are happily married and financially well off and living in their respective families in peace and comfort and that there is nothing to worry about them. Then the dispositions are made in the manner aforesaid. The wills are type written but there is an endorsement in handwriting at the bottom of both the wills indicating that Shibdas Dutta would be the executor in both the wills. This endorsement is written by the hand of one Pankaj Kumar Bosu and the endorsements, themselves indicate that they were made at the registry office at the time of registration of the wills on 21.3.1968. There

is evidence that the attesting witnesses were not present at the time of registration. Consequently, it follows that the endorsement is not attested according to law. There is also no evidence that the endorsements were under instruction from Uttama or that they were read over to her. Mr. Mitter has rightly pointed out that this infirmity is of no consequence at least with regard to Ext. 1 where Shibdas's appointment as Executor is recited in the body of the will itself. It is, therefore, clear that the endorsement in Ext. 1 was redundant. So far as Ext. 1a is concerned the endorsement is clearly of no avail.

15. Before coming to the oral evidence it may be useful to bear in mind certain admitted facts. The testatrix was aged about 70 years when she executed Ext. 1a. and was about 74-75 years when she executed Ext. 1. She had four sons and six daughter four of whom had lost their husbands long ago. The husband of the testatrix Manasha Charan Datta died in 1966.

16. The three witnesses examined on behalf of the propounder are the propounder himself (P.W. 1) Sushil Kumar Ghosh (P.W. 2) and Sasanka Bhowmick (P.W. 3). The evidence of P.W. 1 is that his mother Uttama personally went to the lawyer Soumendra Nath Mukherjee and gave instruction for writing out the wills. The lawyer prepared drafts and thereafter P. W. 1 got them typed by a typist of the Sealdah Court. He proves that his mother executed the wills in presence of the witness and that the wills were duly attested by the attesting witnesses. He admits that the wills were read by his mother herself and hence it was not read out to her.

17. P. W. 2 Sushil Ghosh is a nephew of Uttama. He says that Uttama had a keen sense of understanding that she used to look after her properties herself, and that Uttama had five daughters of whom Lily Datta the youngest reside in the family dwelling house at 40 A,B,C Kareya Road. It is also his evidence that Uttama did not read the will in his presence. P.W. 3 Sasanka is an attesting witness to the first will. He also does not say that the will was read over to Uttama or that she read it herself in his presence. He, however, says that on his query Uttama admitted that she was executing the will voluntarily and consciously.

18. The witnesses on behalf of the caveators are D.W. 1 Bindu Basini, D. W. 2 Ashalata Bose and D.W. 3 Lily Datta. They denied that their mother had executed the wills set up by the propounder. D.W. 1 admittedly became a widow in 1946. She lives in house belonging to the testatrix without payment of rent, the house being made by brick walls and tin roof. It is also her evidence that the other three widowed sisters namely Subhasini, Provabati and Asha have been living in the family dwelling house at 40, A, Kareya Road, and that due to their indigent circumstance the mother used to help them financially for their maintenance. D.W. 2 Ashalata also asserts that her mother brought

her to the house when she became a widow and maintained her and her children. She also says that her sister Subhasini has also been residing at 40 A, Kareya Road and living on the charity of her mother. D.W. 3 Lily Datta admittedly resides in a self contained three roomed flat of the house with her husband who is a government employee. She says that Subhasini, Provabati and Ashalata all reside in the same house and that formerly their mother Uttama helped them financially and that now their sons are maintaining themselves somehow. As regards the other sister Padmabati, whose husband Gouranga is an attesting witness to Ext. 1a the evidence of D.W. 3 is that Gouranga belongs to the camp of her brothers, that he lives at Bijoy Mukherji Lane with wife in a house belonging to Narendra Nath Datta, but not as a tenant. It is also her evidence that Gouranga is unemployed. It was however, pointed out that D.W.3 has said in her evidence that her mother told her about execution of the wills. This is practically the sum and substance of the oral evidence adduced in this case. The learned Judge has found that the wills contained certain false recitals regarding the financial standing of the daughters. It is said in the wills that they are well off and happily residing in their respective families so that there is no cause for anxiety about them. These recitals stand disproved by the evidence already discussed above. We are satisfied from the evidence that three of the daughters since their widow-hood had been residing in the family of Uttama that another daughter Bindu Basini has been residing in a tin roof house belonging to Uttama without payment of rent and that they were receiving assistance from Uttama for their maintenance. P. W.'s 1 and 2 were constrained to admit that the mother namely Uttama occasionally helped the daughters. The evidence thus indicates that these daughters instead of being affluent were constrained to receive financial help from their mother. The recitals in the wills therefore, are patently false. The next suspicious circumstances, which the learned Judge has considered is that the propounder himself having received substantial benefits was found to participate actively in the matter of preparation and execution of the wills. Mr. Mitter contended that in fact the propounder Sibdas did not stand to derive any benefit under the will Ext. 1a and he made a grievance that the learned Judge read the evidence regarding Ext. 1 into the other will and thus arrived at an erroneous and confused finding. It may be pointed out that the learned Judge did not say that the propounder derived benefits under both the will. He found that the propounder received benefits under Exhibit 1 and took an active part in the execution of that will as also of Ext. 1a. The fact that Sibdas actively participated in the matter of execution of the two wills could not be disputed. It was, he who took the mother to the lawyer on both occasion it was he who collected the drafts and arranged for their

typing. He was present at the time of execution of both and it was he, who took mother at the time of registration as well. If these two wills were the only dispositions made by Uttama then certainly it could not be said that participation by Sibdas in the matter of execution of the two wills was a suspicious circumstances at least with regard to Ext. 1a which apparently did not confer any benefit to him. Mr. Ghosh appearing for the respondents however contended that the two wills ought not to be considered independently of other dispositions made by her which show a consistent attempt at disposing of her properties all in favour of the sons and in favour of one daughter who was more affluent than the others. He argued therefore that the entire series of transactions should be considered as a whole to find out if the participation of Sibdas was of any consequence or not. We have already indicated the various deeds executed by Uttama since 1961. It may be useful to recapitulate the same here, again. Ext. 3b dated 25.1.1961 is a deed of Arpannama dedicating the family dwelling house to Sri Sri Siva appointing the four sons as sebaits after herself. Ext. 2 dated 28.3.1969 is a relinquishment by Uttama in favour of her four sons. This relates to yet another premises namely 52 Halدار Para Road. Ext. C and C1 both dated 11.9.1961 are registered deeds of gift in respect of half share of 72 B, Park Street and 6 A, Meher Ali Road in favour of Shibdas Datta. Ext. 1b is a registered will dated 27.12.1963 in respect of certain properties at Agarpara in favour of Lily Datta. Ext. 3a a registered deed of gift in respect of the identical property in favour of the identical person namely Lily Datta. These are some of the transactions that have come to light during the trial and they undoubtedly show that Uttama had been executing various deeds in a series in which the brothers were mostly to gain. Considered in that light, though Ext. 1a does not purport to confer any benefit directly upon Shibdas the document cannot be isolated from the series of transactions. Ext. 1a was a link in a chain of transactions and hence the participation of Shibdas in the matter of execution of Ext. 1a does not appear to us to be as innocuous or inconsequential as contended by Mr. Mitter.

19. The next suspicious circumstance enunciated by the learned Judge is with regard to the execution of the document. We have already indicated the evidence on the point. Shibdas says that he took the mother on both occasions to the lawyer, that the mother gave instruction, that the draft was read by the mother and that after the final typing the document was executed and attested. None of the three witnesses say that the documents were read over and explained to Uttama or that she understood the contents of the documents before executing the same. The evidence of Shibdas is that the wills were not read out as she had read the same herself P.W.2 Sushil does not say that she read the will in question in his presence. Similar is the evidence of Sasanka although

they said that Uttama told them that she had read the same. The evidence certainly raises some suspicions and doubts as to whether she did really read the wills herself and whether she was competent to read and understand the import on her own. The suspicion is aggravated by the fact that according to the evidence of the daughters Uttama was not sufficiently literate to be able to read the documents far less to understand the same. Their evidence is that her literacy extended merely to the ability of writing her name and nothing more. This evidence finds indirect support from the manner in which her name has been signed in the documents. The writing indicates that it was the work of some novice not sufficiently acquainted with the art of writing. The nature of the writing cannot be attributed merely to her old age because the writings in the earliest of the documents produced at the trial also show similar characteristics. Therefore it is clear that the writing she put on the wills was the best that she was capable of and they do not indicate the writing of a sufficiently literate person. Consequently the necessity of reading out the wills and explaining the same to her assumes importance. A cursory statement that she had read it herself is not sufficient.

20. This apart, there is intrinsic evidence contained in Ext. 2 indicating the state of health and mind of the testatrix at the relevant time. She states in Ext. 2 that her husband Manasha Charan Datta, due to old age became incapable of performing the duties of sebit and relinquished the office in April, 1962. Since then Uttama became the sebit. It is then recited that since the death of her husband in September, 1966 she has been completely incapacitated due to disease, grief and old age. This statement clearly indicates that since 1962 and more particularly since 1966 she became physically and mentally crippled. This admission clearly affects at least the 2nd will and the registration of both. She was not in a proper mental and physical frame at the time. And this again called for clear proof of the fact that she understood the nature of the documents she executed. Such evidence is absolutely wanting.

21. Mr. Mitter also contended that the documents were registered wills and that the fact of registration imports an element of genuineness to the transaction. The decision reported in AIR 1962 SC page 567 was referred to in this connection. It lays down that a will if registered, that is a circumstance which may prove its genuineness. But this decision also lays down that the mere fact that a will is registered, will not by itself be sufficient to dispel all suspicious regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration reveals that it was made in such manner that it was brought home to the testator that the documents of which he was admitting execution was a will disposing of his property and there after he admitted its execution, the registration

will dispel the doubt as to the genuineness of the will. But if the evidence shows that it was done in a perfunctory manner, that the officer registering the will did not read out over to the testator or did not satisfy himself in some other way that the testator knew that it was a will, the fact that the will was registered could not be of much value. In the instant suit the evidence of registration was not submitted for scrutiny. All that we find is that the documents are registered and nothing more. Shibdas does not say what happened at the registration office. Pankaj Kr. Bose who admittedly wrote the endorsements at the registration office and who identified Uttama there, was not called to the witness box. In such circumstances and in the absence of the evidence that it was brought home to the testatrix that she understood the implication and nature of the document she was admitting, the fact that it was registered is inconsequential.

22. The next suspicious circumstances is the non examination of witnesses who might have thrown some light as to the nature of transaction. The learned Judge feels that this was a case in which the lawyer who drafted the wills should have been examined. Shibdas concedes that the lawyer had acted on their behalf on several other occasions and that he was present in Court during the trial of the suit. Since the evidence as to whether the wills were read over or explained to the testatrix is doubtful if not entirely lacking, the non examination of the lawyer who prepared the drafts allegedly under instruction from Uttama assumes importance. Mr. Mitter however contends that Shibdas was a layman and did not realise the importance of non examination of the lawyer. It was also pointed out that the lawyer himself was conducting the case of the propounder in the trial Court. The fact that Shibdas was a layman does not seem to be a matter of much moment because at the time when the question of examination of the lawyer arose, that is to say during the trial, he was certainly acting under legal advice and not on his own independent judgement. Mr. Ghosh on the other hand referred to a decision in the case of (6) *Sarat Kumari Debi v. Raj Sakhi Chand Bahadur*, reported in AIR 1929 P.C., page 45. In that case the lawyer who drafted the will was not called as a witness. The explanation for the absence of the latter from the witness box was that he was appearing as a Vakeel for the executors at the hearing of the case. A particular clause in the will in that case was in question. The clause was held to be suspicious and one of the reasons for such suspicion was the non examination of the lawyer, in spite of the fact that he was acting as a Vokeel at the trial.

23. In this connection it is also pertinent to refer to the non examination of Gouranga Bhushan Bose an attesting witness to Ext. 1a. This Gouranga Bhushan Bose is the husband of Padmabati. The evidence

of Lily Datta that Gouranga resides in a house of Narendra without payment of rent and that he is at the moment unemployed lends some support to the theory that he could not possibly dis-oblige Narendra by refusing to be an attesting witness. His evidence if available, might have given some indication as to the circumstances and manner in which the will in question was done. It was however pointed out that Gouranga verified the application for grant of probate stating that he was a witness to the will dated 27.12.1963. The verification cannot be looked upon as evidence.

24. Before leaving this aspect of the matter it may be mentioned that P.W. 3 Sasanka is also not an independent witness. He is a co-employee of the propounder Shibdas. He admits that he is a sub-tenant under Nirmal and that he has no receipts to show his sub-tenancy. Evidently his rights as a sub-tenant not being supported by any receipts is a precarious one. Necessarily he is interested to oblige Nirmal. Sushil though admittedly a relation of the parties, does not seem to know much of the family, for he says that Uttama had five daughters while it is the admitted case of the parties that she has six daughters. This is the quality and calibre of the witnesses examined and we do not feel very much impressed by their performance. In that view of the matter also non examination of the other attesting witnesses and more particularly of the lawyer is of some consequence.

25. The next suspicious circumstance relied on by the learned Judge is a statement by Shibdas in cross-examination admitting that not only before but also after the two wills in question his mother executed other wills. Mr. Mitter however drew our attention to the subsequent statement of Shibdas that there is no other will except the three wills. Shibdas has undoubtedly said so on his further cross-examination after recall. He was recalled seven days after his examination and cross-examination was over. Be that as it may we do not consider it proper to attach too much importance to this fact for the simple reason that no other will besides the three came to light and there was no suggestion that there were other wills executed by the testatrix. In this context the evidence of Shibdas with regard to the endorsement in the wills made by the Pankaj Mr. Bose at the time of registration may be considered. The evidence of Shibdas is that only the name of his father Manasha Ch. Datta was written at the registration office by Pankaj Mr. Bose and not the six lines, meaning thereby the hand written endorsement. This evidence is ambiguous and meaningless. The will Ext. 1a shows that a signature purporting to be of Manasha Ch. appears at the bottom as an attesting witness. If the evidence of Shibdas is believed then it would mean as if this name was written at the registration office which certainly he did not intend to say. If the evidence is disbelieved it only shows his anxiety to embellish.

26. The next important suspicious circumstance is the manner of disposition namely exclusion of the daughters except Lili Datta. Mr. Mitter argued upon a reference to a decision in the case of (7) *Sushiladebi v. Pandit Krishna Kr.* AIR 1971 SC page 2236 that if the execution of the will be satisfactorily proved, the fact that the testator had not bequeathed any property to one of his children cannot make the will invalid. The decision however further lays down that if the bequest made in the will appear to be unnatural then the Court has to scrutinise the evidence in support of the execution of the will with a greater degree of care than usual. There is no gain-saying the fact that some individuals do behave in an abnormal manner. Their Lordships have therefore, stated that Judges cannot impose their own standard of behaviour on those who execute wills. While it is true that once the probate Court is satisfied that the testator's mind was clear and that he was conscious of the implications of the document he was about to execute, it is not the function of the Court to investigate whether a bequest more consonant with reason and justice could or could not have been made. In the instance case, we are not satisfied from the evidence that the testatrix knew or comprehended the nature of the act she was doing and consequently this goes to the very root of the case and shakes the foundation of the propounder's claim. In any event it cannot be denied that the nature of the disposition is unusual, if not unnatural. This is more so because some attempt has been made to explain the exclusion of the daughters in the wills themselves and the explanation, we have already found is false.

27. The next suspicious circumstance considered by the learned Judge is the fact that the existence of the earlier will is not referred to in the subsequent will dated 18.3.1968. This, we are unable to consider as a suspicious circumstance. The next suspicious circumstance is said to be non-examination of the other attesting witnesses. It is not necessary that all the attesting witnesses need be examined. All that is necessary is to prove due attestation. If the evidence is convincing such attestation may be proved without examination of all the attesting witnesses. In this case, however, we have found that in the peculiar circumstances of the case that Gouranga should have been examined. The other two suspicious circumstances relied on by the learned Judge, namely, that a portion of the earlier will was not duly attested, meaning thereby the hand-written endorsement and the position of the Uttama's signature in the wills vis-a-vis, the hand-written endorsements are not really suspicious circumstances at all. They prove nothing this way or the other.

28. Having thus considered the entire evidence and the circumstances of the case, we find that the wills contain certain false recitals, that there is no satisfactory evidence that she could, in fact, read the documents or that she had read the same, nor is there any evidence that

it was read out to her. There is no evidence that she comprehended the nature and import of the disposition. We further find that the disposition was rather unusual in character and that though this may not by itself be a sufficient ground to invalidate the will, yet read in the context of the falsity of the recitals to justify the unusualness, it assumes a suspicious character not clarified by the evidence furnished by the propounder. We further find that some very vital and important witnesses have not been examined and no explanation is forth-coming for their non-examination. Considering all the circumstances we are unable to find that the genuineness of the will has been satisfactorily proved. The onus that lay on the propounder has not been discharged. The appeal, accordingly, should fail.

The appeal is dismissed. We make no order as to costs.

Sen. J. : I agree.

P. R.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Amiya Kumar Mookerji

Decision : January 31, 1978

Shiv Prasad Sharma **Petitioner**

Versus

Union of India & Ors. ... Respondents*

Reversion to former post, if justified—Absorption against a permanent vacancy, whether brings the previous post to an end.

Petitioner was appointed as Khalasi in the Kanchrapara Workshop on March 11, 1965. He was confirmed in the said post on May 1, 1969 and he became eligible for promotion to class III cadre comprising 25% of the posts of typists, clerks and ticket collectors. He went through several tests for the post of a typist and he was finally declared selected and promoted by the establishment order dated September 14, 1971. He joined the post of typist grade II on September 16, 1971 and he was absorbed permanently in that post with effect from April 10, 1974. Thereafter in 1975 some outsider typists were recruited and an order was passed by the respondent reverting the petitioner to the post of an electric fitter. Petitioner challenged the order by writ petition under Art. 226 of the constitution of India and obtained the Rule. Respondent Personel Officer contended that the petitioner had been appointed as a typist on ad hoc basis and subsequently was absorbed against a working post of typist according to his turn and that his turn did not arrive yet.

HELD: The order dated April 10, 1974 stated that sharma (the petitioner) typist grade II was absorbed against a working post of typist

**Civil Rule No. 11689 (w) of 1976.*

gr. II and posted vice Halder who was promoted to gr. I. The order dated April 10, 1974 is an unconditional order. By the order dated April 10, 1974 when the petitioner was absorbed against a permanent vacancy of the post of typist gr. II his previous post of khalasi came to an end and it could not be said that his absorption was not against 25% quota reserved for class IV staff.

In the result the rule is made absolute.

Case referred to :—

(1) CR 1990 (w) of 1970 unreported.

Saktinath Mukherjee, Madhusudan Banerjee and

S. P. Sahay *for the petitioner*

Prasanta Kumar Ghose *for the respondents*

The judgment of the Court was as follows :—

This Rule is directed against an order of reversion dated 9.6.76 passed by the Workshop Personnel Officer, Kanchrapara by which the petitioner who was previously absorbed as typist-Gr. II in the scale of Rs. 260-400/- was reverted to the post of B.T. Electric Fitter in the scale of Rs. 210-290/-.

2. The petitioner was appointed as "Khalasi" in the Kanchrapara Workshop in the Eastern Railway on the 11th of March, 1965, Being confirmed in the said post with effect from 1st May, 1969 the petitioner became eligible for promotion to class-III cadre comprising 25% of the posts such as typist, clerk, commercial clerk and ticket collector. The qualification that was prescribed for promotion as typist gr. II was that, the candidate should have a minimum typing speed of 40 w.p.m. the petitioner had acquired his prescribed typing speed. He had to undergo a series of tests beginning from the speed test on 25th of January, 1971 and ending with the oral test on 9th September, 1971 before finally declared selected and promoted by the establishment order dated 14.9.72 issued by the Workshop Personnel Officer, Eastern Railway, Kanchrapara. On and from 16th September, 1971, the petitioner joined the said post of typist Gr. II. After having rendered non-fortuitous service starting from 16.9.71, the petitioner was absorbed permanently against the working post of typist gr. II in the office of the Superintendent, Workshop with effect from 10th of April, 1974. He was posted vice one Shri S. K. Halder promoted as typist gr. I from his post of typist gr. II- It is alleged that the Superintendent, Workshop recruited locally between January 1975 and April 1975 three lady typists in gr. II who were junior to the petitioner. Thereafter the impugned order was passed by which the petitioner was reverted to the post of Electric Fitter. It is stated in the petition that from the date of the petitioner's joining to the post of typist on and from 16th September, 1971 he has been given five increments during the last five years and his present increments during the last five years and his present basic pay is Rs. 295/-

in the scale of Rs. 260-400/-. The petitioner being aggrieved by the said order of reversion moved this court under Art. 226 of the Constitution and obtained the present rule on 6.9.76. An interim injunction was also granted by which the operation of the impugned order was stayed. An affidavit-in-opposition has been filed on behalf of the respondent No. 1 and affirmed by Hrishikesh Das Sharma workshop personnel officer wherein it is stated that the petitioner who was appointed to officiate as typist gr. II with effect from 10.4.72 on ad hoc basis and on the terms and conditions mentioned above, was first posted as leave Reserve typist gr. II against a Leave Reserve post of typist and subsequently absorbed against a working post of typist gr. II vide estt. Order dated 10.4.74 according to his turn. This did not confer upon him any claim of his being absorbed against 25% vacancies reserved for class IV staff as his turn for absorption against 25% quota did not come, no office order treating him as absorbed against 25% vacancies of the typist gr. II was issued.

3. Mr. Mukherjee, appearing on behalf of the petitioner contended that by an order dated 14.9.71 the petitioner was promoted as L. R. typist against an existing vacancy. In the order it is stated that the promotion of the petitioner to the post of typist gr. II is made temporarily as stop gap arrangement subject to the replacement when Railway service commission candidate or approved typist from other division become available or absorption in future vacancies against 25% quota for class IV staff whichever is earlier. By an order dated 10th April, 1974 which is annexure H to the petition, it is stated that S. P. Sharma, L. R. typist gr. II in the scale of Rs. 260-400/- attached to S. W. S. Office/K. P. A. is absorbed against a working post of typist gr. II at his present pay and grade and posted vice Shri S. K. Halder who was promoted to officiate as typist gr. I on a pay of Rs. 380/- per month in the scale of Rs. 330-560/-. According to Mr. Mukherjee when the petitioner was absorbed in terms of the previous order against a permanent vacancy, he could not be reverted without following the procedure laid down under Art. 311(2) of the Constitution. Reliance was placed upon an unreported decision of this court dated 31.1.73 passed in C. R. 1990 (W) of 1970. In that decision the word "absorption" has been construed. It has been held that it would mean the petitioner's existence as an officer in T. R. A. C. lost its existence when it was the appointment in terms of the said circular". By an order dated 10th April, 1974 when the petitioner was absorbed against the working post of typist gr. II his previous post of Khalasi came to an end. It is true that his previous appointment by an order dated 14.9.71 was a stop gap arrangement and it did not confer upon him a right to hold that post but after he was absorbed by an order dated 10.4.74 against a permanent vacancy it could not be said that his absorption was not against 25% quota reserved for class IV staff. The order dated 10th October, 1974 is an unconditional order and nowhere it is

stated that the petitioner's absorption was on ad hoc measure as made out in the affidavit-in-opposition.

4. In the result, this Rule is made absolute. The impugned order of reversion is quashed. Let a writ of Mandamus be issued commanding the respondents not to give effect to the said impugned order dated 9th June, 1976. There will be no order for costs.

Prayer for stay of operation of the order is refused.

P. R.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Murari Mohan Dutt and Mr. Justice

Dhires Chandra Chakravarti

Decision : August 30, 1978

Indian Overseas Bank Ltd. Petitioner

Versus

Thermolith Products Private Ltd. & Ors. ... Opposite parties

Misjoinder of parties—Code of Civil Procedure—Order 1 Rule 3 and Rule 3A.—Joinder of Causes of action, Order 2 Rule 6—Jurisdiction of Court—Leave under sec. 20(b).

Plaintiff bank instituted a suit against the defendants nos. 1 to 8 for recovery of about Rs. 81,000/- advanced by the plaintiff to defendant No. 1 a Company of which defendants Nos. 2, 3 and 4 were Directors. Defendant No. 6 assigned to the plaintiff certain direct bills drawn by the defendant No. 6 on the defendants Nos. 7 and 8 in liquidation of the liabilities of the defendant No. 1 to the plaintiff. Defendant No. 5 guaranteed due repayment to the plaintiff upto Rs. 60,000/- in the event of the plaintiff not receiving payment from defendants Nos. 7 and 8. Plaintiff alleged that the defendants Nos. 7 and 8 refused to pay any amount in respect of the said direct bills on the ground that no sum was due by them under those bills. These two defendants also contended that the suit was not maintainable against them (1) in view of the provision of Order 1 Rule 3 of the Code of Civil Procedure they were wrongly joined in the suit and (2) that the Court had no jurisdiction as those defendants did not reside nor did they carry on business within the jurisdiction of the Court. The Subordinate Judge, Alipore held that the defendants Nos. 7 and 8 had been wrongly added and directed the plaintiff to elect as to which of the defendants Nos. 1 to 8 it would proceed against. The plaintiff applied to High Court challenging the order of the Subordinate Judge and obtained a Rule.

HELD : According to the provisions of Order 1 Rule 3 of C.P.C in order to support the joinder of the defendants Nos. 7 and 8, two conditions must be fulfilled, namely (1) whether the right to relief against

*Civil Revision Case No. 4213 of 1974.

the said defendants can be said to be in respect of or arising out of the same act or transaction or series of acts and transactions and (2) whether any common question of law or fact would arise if separate suits were brought against them. The right to relief claimed by the plaintiff against the defendants Nos. 1 to 6 is based on the loan transaction between the plaintiff and the defendant No. 1 but that against the defendants Nos. 7 and 8 is based on the assignment by the defendant No. 6 to the plaintiff of bills payable by the defendants No. 7 and 8 to the defendant No. 6. The two transactions are completely different. No common question of law or fact would arise between the plaintiff and the defendants Nos. 1 to 6 on the one hand and the plaintiff and the defendants Nos. 7 and 8 on the other. The cause of action against the defendants Nos. 7 and 8 is completely different from that against the defendants Nos. 1 to 6. The provision of Order 1 Rule 3 of the Code of Civil Procedure is not applicable. The defendants Nos. 7 and 8 have been wrongly joined in the suit.

Order 1 Rule 3A provides that when it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials. But unless the joinder of the defendants is a proper joinder, the provision of Rule 3A will not apply. Similarly Order 2 Rule 6 contemplates proper joinder of causes of action and not improper joinder of causes of action.

As the defendants Nos. 7 and 8 carry on business outside the jurisdiction, the Court has no jurisdiction to try the suit against these defendants. However if the plaintiff elects to proceed against the defendants Nos. 6, 7 and 8 and can prove that the defendant No. 6 carries on business within the jurisdiction of the Court below, the plaintiff will be at liberty to pray for leave for proceeding against the defendants Nos. 7 and 8 under sec. 20(b) of the Code of Civil Procedure.

B. C. Dutt and P. K. Bose	...	...	for the Petitioner
G. S. Rawat	...	...	for the Opposite party No. 8
Shyamal Sen	...	...	for the Opposite party No. 7

The judgment of the Court was as follows :—

Dutt J. : This Rule is at the instance of the plaintiff, the Indian Overseas Bank Ltd., and it is directed against order No. 116, dated July 27, 1974 of the Subordinate Judge, First Court, Alipore. By the said order, it has been held by the learned Subordinate Judge that the defendants nos. 7 and 8 have been wrongly added as parties to the suit. The learned Subordinate Judge has directed the plaintiff bank to elect as to which of the defendants nos. 1 to 8 it would proceed against.

2. The suit out of which this Rule arises is one for the recovery of the sum of Rs. 80,967.78 advanced by the plaintiff bank to the defendant no. 1, a company, of which the defendants nos. 2 to 4 are the Directors. The defendant no. 6 assigned to the plaintiff certain direct bills drawn by the

defendant no. 6 on the defendants nos. 7 and 8, in liquidation of the liabilities of the defendant no. 1 to the plaintiff. The defendant no. 5 is the surety and he executed a letter of guarantee in favour of the plaintiff thereby guaranteeing due repayment to the plaintiff up to a sum of Rs. 60,000/- in the event of the plaintiff not receiving payment from the defendants nos. 7 and 8. It is the case of the plaintiff that in spite of repeated demands the defendants nos. 7 and 8 have refused to pay any amount in respect of the said direct bills alleging that no sum was due by them under those bills. Upon the said allegations, the plaintiff impleaded the said defendants nos 7 and 8 in the suit.

3. The defendant no. 8 raised a preliminary objection as to the maintainability of the suit against it and also the jurisdiction of the Court. It was contended on behalf of the defendant nos. 7 and 8 that in view of the provision of Order 1, rule 3 of the Code of Civil procedure, they were wrongly joined in the suit. Further, it was contended that as they did not reside and carry on business within the jurisdiction of the Court, the Court could not try the suit as against them. The learned Judge upheld the contentions of the defendants nos. 7 and 8 and, as stated above, directed the plaintiff to elect as to against which of the defendants it would proceed in the suit. Hence this rule.

4. The principal question that is involved in this Rule is whether the defendants nos. 7 and 8 have been wrongly joined in the suit as contended on their behalf. Rule 3 of Order 1 of the Code of Civil Procedure provides that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise. In order to support the joinder of the defendants nos. 7 and 8, two conditions must be fulfilled, namely, (1) whether the right to relief against the said defendants can be said to be in respect of or arising out of the same act or transaction or series of acts or transaction and (2) whether any common question of law or fact would arise if separate suits were brought against them. The right to relief claimed by the plaintiff against the defendants nos. 1 to 6 is based on the loan transaction between the plaintiff and the defendant no. 1. On the other hand, the right to relief claimed by the plaintiff against the defendants nos. 7 and 8 is based on the assignment by the defendant no. 6 to the plaintiff of certain direct bills payable by the defendants nos. 7 and 8 to the defendant no. 6. These two transactions are completely different and one has no connection with the other. It is difficult to say that the right to relief as claimed by the plaintiff against the defendants including the defendants nos. 7 and 8 arises out of the same act or transaction or series of acts or transactions. Moreover,

no common question of law or fact would arise between the plaintiff and the defendants nos. 1 to 6 on the one hand and the plaintiff and the defendants nos. 7 and 8 on the other. The cause of action against the defendants nos. 1 to 6 is different from that against the defendants nos. 7 and 8. So far as the defendants nos. 1 to 6 are concerned, the cause of action is the advancement of the loan by the plaintiff to the defendant no. 1 and failure of the defendant no. 1 to repay the same to the plaintiff. On the other hand, the cause of action against the defendants nos. 7 and 8 is the assignment to the plaintiff by the defendant no. 6 of certain direct bills payable by the defendants nos. 7 and 8 and the failure of the defendants nos. 7 and 8 to pay the said bills. The cause of action against the defendants nos. 7 and 8 is completely different from that against the defendants nos. 1 to 6. The facts which are to be proved and enquired into so far as the defendants nos. 7 and 8 are concerned will be quite different from those in respect of the defendants nos. 1 to 6. The bills which have been assigned by the defendant no. 6 to the plaintiff relate to the price of certain goods alleged to have been supplied by the defendant no. 6 to the defendants nos. 7 and 8. The plaintiff has to prove that the said goods were supplied and that the defendants nos. 7 and 8 have not paid the price thereof. In this connection, it may be stated that the defendant nos. 7 and 8 have *inter alia* denied that any sum is due by them on account of the said bills. Thus it appears that the provision of Order 1, rule 3 of the Code of Civil Procedure is not applicable for the purpose of the joinder of defendants nos. 7 and 8 along with other defendants. The learned Judge, in our opinion, has rightly held that the defendants nos. 7 and 8 have been wrongly joined in the suit.

5. It has been urged by Mr. Bankim Chandru Dutt, learned Advocate appearing on behalf of the plaintiff petitioner, that in view of the provision of the New Rule 3A inserted by the Code of Civil Procedure (Amendment) Act, 1976, the suit may be separately tried against the defendants nos. 1 to 6 and defendants nos. 7 and 8. Rule 3A provides that where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interest of justice. It is contended by Mr. Dutt that the words "any joinder" in rule 3A includes also a wrong joinder of a defendant. We are unable to accept the contention. In our opinion, unless the joinder of the defendants is a proper joinder, the provision of rule 3A will not apply. A suit cannot be tried against a person who has been wrongly joined. When a person is joined in the suit as a defendant without any cause of action against him, the suit will not be maintainable against him. In such a case, there cannot be any question of joint or separate trials against such person. Similarly, Order 2, rule 6 of the amended Code provides that where it

appears to the Court that the joinder of causes-of-action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice. Rule 6 also contemplates proper joinder of causes-of-action and not improper or wrong joinder of causes-of-action. In these circumstances, the contention made on behalf of the petitioner is without any substance and is rejected.

6. It has been held by the learned Judge that the defendants nos. 7 and 8 carry on their business outside the jurisdiction of the Court. There is no averment in the plaint that the goods in respect of the disputed bills were supplied to the defendants nos. 7 and 8 within the jurisdiction of the Court. The endorsement of the said bills in favour of the plaintiff by the defendant no. 6 was also made outside the jurisdiction of the Court. In these circumstances, it has been held by the learned Judge that the Court has no jurisdiction to try the suit as against the defendants nos. 7 and 8. In view of the said finding of the learned Judge it is difficult to appreciate how the learned Judge could put the plaintiff to election as to against which of the defendants it would proceed in the suit. Mr. Dutt submits that if separate suits had been brought against the defendants nos. 7 and 8, the defendant no. 6, the assignor of the bills would also be a necessary party. It is also submitted by him that the defendant no. 6 has its factory within the jurisdiction of the Court below, and accordingly, in view of the provision of section 20(b) of the Code of Civil Procedure, the suit can be proceeded with against the defendants nos. 7 and 8 with the leave of the Court. In our opinion, if the plaintiff ultimately elects to proceed against the defendants nos. 6, 7 and 8 and can prove that the defendant no. 6 carries on business within the jurisdiction of the court below, the plaintiff will be at liberty to pray for leave for proceeding against the defendants nos. 7 and 8 under section 20(b). If any leave is prayed for by the plaintiff, the court below will consider the same. The plaintiff, however, shall make the election within three weeks from the date of arrival of the records in the court below.

7. Subject to the observation made above, this Rule is discharged. There will, however, be no order for costs.

Chakravarti, J. : I agree.

P. R.

[SPECIAL JURISDICTION (INCOME TAX)]

Before Mr. Justice Samarendra Chandra Deb and Mr. Justice

Dipak Kumar Sen

Decision : December 2, 1975

Commissioner of Income Tax Applicant
Versus

Eastern Equipment and Sales Ltd. Respondent*

80% shares of the assessee-company held by two public limited companies—Whether shares are held by the public—Whether the assessee company can be said to be a company in which public are substantially interested—Section 2(18), Section 104 of the Income Tax Act, 1961.

The assessee is a limited company in which two other limited companies, namely, Messrs. Western Bengal Coal Fields Ltd. and Messrs. Central India Coal Fields Ltd. held 80% of the shares at the material time. The share-holders of the said two holding companies were inter alia, the Unit Trust, some Scheduled Banks, the Life Insurance Corporation and other Insurance Companies. For the assessment year 1962-63 the Income Tax Officer levied additional super-tax under Section 104 on the grounds that the assessee-company was not a company in which the public were substantially interested within the meaning of Section 2(18) of the Income Tax Act, 1961. On appeal, the Appellate Asstt. Commissioner accepted the contention of the assessee. On further appeal before the Tribunal by the Revenue, the Tribunal came to the conclusion that the assessee was a company in which public were substantially interested.

On a reference at the instance of the Revenue—

HELD : If it was found that the public were, in fact, substantially interested in the holding companies and if it was held that the holding companies were companies within the meaning of Section 2(18) of the Income Tax Act, 1961, then it would follow that the shares of the assessee company were held by the public and the assessee Company would be a public limited company within the meaning of that section.

Cases referred to :—

- (1) *Shree Chandeo Sugar Mills Ltd. v. Commissioner of Income Tax*, Bom., 41 ITR 667
- (2) *Indian Hume Pipe Co. v. Commissioner of Income Tax*, 74 ITR 760
- (3) *Commissioner of Income Tax, Bombay v. Scindia Steam Navigation Co. Ltd.*, 42 ITR 589
- (4) *Pilani Investment Corporation Ltd. v. Commissioner of Income Tax (Central)*, Cal., 89 ITR 53
- (5) *The Income Tax Officer, 'C' Ward, Companies Dist. I, Calcutta & Others v. Padmavati Raje Cotton Mills Ltd.* (Unreported)

*Income-tax Reference No. 75 of 1971.

B. L. Pal and P. K. Majumdar *for the Applicant*
Dr. D. Pal and R. Murarka *for the Respondent*

The judgment of the Court was as follows :—

Sen, J. : In this Reference under Section 256(1) of the Income-tax Act, 1961 at the instance of the Commissioner of Income-tax the question which arises for determination is whether the assessee Eastern Equipment and Sales Limited, in the assessment year 1962-63, came within the mischief Section 104 of the Act.

2. The facts admitted and/or found are that the assessee is a limited company in which two other limited companies, namely, Messrs. Western Bengal Coal Fields Limited and Messrs. Central India Coal Fields Limited held 80% of the shares at the material time. The shareholders of the said two holding companies were, *inter alia*, the Unit Trust, some Scheduled Banks, the Life Insurance Corporation and other Insurance Companies. A list of the share-holders in the said two holding companies has been annexed to the statement of case being annexure "A".

3. In the assessment year in question the assessee had declared only Rs. 22,500/- as dividend, whereas if Section 104 of the Income-tax Act, 1961 was applicable the assessee should have declared 60% of its distributable surplus, namely, Rs. 60,737/-

4. In the proceedings under Section 104 before the Income-tax Officer it was contended that the assessee was a public limited company in which the public were substantially interested within the meaning of Section 2 (18) of the Income-tax Act, 1961. The contentions of the assessee were rejected and additional super-tax under section 104 was levied.

5. On appeal it was held by the Appellate Assistant Commissioner that the assessee was a company in which the public were substantially interested. The Appellate Commissioner relied on the decision of the Supreme Court in the case of (1) *Shree Changdeo Sugar Mills Limited v. Commissioner of Income-tax, Bombay*, reported in 41 Income-tax Reports, page 667 and allowed the appeal.

6. The Revenue preferred a further appeal to the Tribunal. It was submitted on behalf of the Revenue before the Tribunal that the public were not substantially interested in the assessee inasmuch as the assessee company had been described in the Report of the Monopolies Enquiry Commission as being a company under the Birla group and further the said two holding companies were also described in the said Report as belonging to that group. In support reliance was placed on a decision of the Bombay High Court in the case of (2) *Indian Hume Pipe Co. v. Commissioner of Income-tax*, reported in 74 ITR 760,

7. It was contended by the assessee on the other hand that the assessee was a company within the meaning of section 2(18) of the Act and as such the decision of the Bombay High Court had no application.

8. The Tribunal came to the conclusion that the assessee was a company in which the public were substantially interested.

9. It was found by the Tribunal that the contents of the Report of the Monopolies Enquiry Commission were not relevant inasmuch as the shares of the holding companies were quoted in the Stock Exchange and there were frequent changes in such shareholding. The commission started functioning only in May, 1964 whereas the relevant assessment year was 1962-63 of which the previous year was even earlier. The Tribunal held that the shareholdings in the said two holding companies at the relevant time could not be related to the said Report.

10. The Tribunal concluded that there was no material before it to disturb the findings of the Appellate Assistant Commissioner that the two holding companies were public companies within the meaning of section 2(18) of the Income-tax Act, 1961.

11. The question which has been referred to us from this order of the Tribunal is as follows :—

“Whether, on the facts and in the circumstances of the case, the assessee was a company in which the public were substantially interested within the meaning of section 2(18) of the Income-tax Act, 1961 in view of 80% of its shares being held by the two companies, Western Bengal Coal Fields Ltd. and Central India Coal Fields Ltd.?”

Mr. B.L. Pal, learned Counsel for the Revenue, contended before us at the hearing that the Tribunal had proceeded only on the basis that the two holding companies were public limited companies within the meaning of the Companies Act, 1956 and that the Tribunal did not apply its mind to the question whether the public in fact were substantially interested in the said two holding companies. Even assuming that this particular question had not been referred, on the authority of the well known decision in the case of (3) *Commission of Income-tax, Bombay v. Scindia Steam Navigation Co. Ltd.*, Mr. Pal contended that the question how being agitated by him was in issue before the Tribunal and could be stated to be one of the aspects of the question actually referred.

12. Mr. Pal, however, did not dispute that if it was found that the public were in fact substantially interested in the said two holding companies and if it was held that they were companies within the meaning of section 2(18) of the Income-tax Act, 1961, then it would follow that the assessee was also a public company within the meaning of that section.

13. This proposition is concluded by the decision of the Supreme Court reported in 41 ITR at page 667 as aforesaid and also by another decision of the Supreme Court in the case of (4) *Pilani Investment Corporation Ltd. v. Commissioner of Income-tax (Central), Calcutta*, reported in 89 ITR 53. In an unreported decision of this Court in Appeal No. 117 1971 (5) (*The Income tax Officer, 'C' Ward, Companies Dist. I. Calcutta*

& others v. Padmavati Raje Cotton Mills Ltd.) the same point has been decided.

14. Dr. Debi Pal learned counsel on behalf of the assessee relied on the aforesaid decisions in support of his contentions. He further contended that in the instant case there was specific finding of the Tribunal that the two holding companies were companies in which the public were substantially interested and that they came within the ambit of section 2(18) of the Income-tax Act, 1961 and that as such the question is a question of fact which has been concluded by the finding of the Tribunal.

15. It appears to us that the contentions of the assessee should succeed in the instant case. We find that complete lists of the shareholders of the two holding companies were before the Tribunal and were considered. It further appears that the only evidence adduced by the Revenue before the Tribunal, namely, the Report of the Monopolies Enquiry Commission was rejected by the Tribunal. The Tribunal upheld the finding of the Appellate Assistant Commissioner, and noted that the Revenue had never contended that the two holding companies were not companies in which the public were substantially interested before the Appellate Commissioner.

16. The above findings of the Tribunal have not been challenged as perverse or as based on no evidence or irrelevant evidence.

17. In this view we answer the question referred to us in the affirmative and in favour of the assessee. There will be no order as to costs.

Deb, J. ; I agree.

A. S. G.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee and Mr. Justice

B. C. Ray

Decision : September 14, 1978

Prasanta Kumar Bose and others ... Appellants

Versus

Director of Secondary Education, West Bengal and others ... Respondents*

Superannuation—Time limit for application for extension of service—Management of Recognised Non-Government Institutions (Aided and unaided) Rules 1969—Circular No. 21 dated December 12, 1952 of Board of Secondary Education—Violation of natural justice—Recording of reasons in the order.

P. K. V. H. S. school is an unaided institution recognised by the

*Appeal from Original Order No. 661 of 1978.

West Bengal Board of Secondary Education. Appellants claim to be members of the Managing Committee of the said school. Respondent No. 3 had been the Headmaster of the said school. He had attained the age of superannuation on November 30, 1974 but he was granted three successive extensions of service by the Managing Committee. On June 21, 1977, he made an application to the Secretary of the said school for extension of service for one year from December 1, 1977. On October 15, 1977 he made an application to the Director of Secondary Education for granting him extension for one year. District Inspector of Schools recommended the extension for one year. On October 29, 1977, the Managing Committee resolved not to entertain the application for extension on the ground that it was belated. On November 15, 1977, Director of Secondary Education passed an order extending the period of service of the Headmaster from December 1, 1977 to November 30, 1978. Appellants obtained a Civil Rule challenging the said order of the Director but subsequently the Rule was discharged. Against the judgment, Appellants then preferred this appeal under cl. 15 of the Letters Patent. Appellants contended (1) that the Headmaster had not applied for extension at least six months before the previous extension as required by the circular no. 21 dated December 12, 1952, (2) that the Director did not give them any opportunity of hearing before granting extension of service and (3) that the Director did not record his reasons for the extending of the service by one year.

HELD: Management of Recognised Non-Government Institutions (Aided and unaided) Rules, 1969 does not prescribe any time limit for application for extension of service and the circular No. 21 dated December 12, 1952 issued by the Board of Secondary Education cannot over-ride or modify the said statutory Rules. Requirement of the said circular cannot be considered mandatory. The said circular does not apply to the present case.

Further that the records indicate that all relevant papers were placed before the Director of Secondary Education before he passed the order granting extension of service of the Headmaster. In the facts of the case there was no failure of justice because of absence of any final notice upon the appellants. Therefore the impugned order of the Director cannot be struck down.

Further that although sub-rule (3) of rule 28 of the Management of Recognised Non-Government Institutions (Aided and unaided) Rule, 1969 does not expressly require the Director to record the reasons in his decisions. Yet having regard to the nature of his statutory powers and the consequences thereof, the Director is required to briefly record his reasons in order to show that he applied his mind and did not act arbitrarily. It is incumbent upon the Director to record briefly his reasons for allowing the representation of

a teacher and for over-riding the decision of the Managing Committee.

In this case the Director did not record his reasons in his order. Considering all the circumstances, however, it would be futile at this stage to remit the question of extension of service of the Headmaster, which expires on November 30, 1978, to the Director. The appeal is dismissed.

Bhagabati Prosad Banerjee, Parimal Das and ...

B. Chakraborty ... *...for appellants*

J. K. Banerjee and Amitava Dutta ... *...for respondents nos. 1, 2 & 5*

A. K. Lahiri ... *...for respondent no. 4*

Amitava Chowdhury ... *...for respondent no. 3*

The judgment of the Court was as follows :—

Mookerjee, J.: Purba Kalikata Vidyatan Higher Secondary School for Boys is an aided institution recognised by the West Bengal Board of Secondary Education. The appellants claim to be the members of the Board of Trust of the Beliaghata Chhatra Sansad and also the members of the Managing Committee of the said school. The respondents dispute the right of the appellants to function as the Managing Committee of the said school. The said question is the subject-matter of another Civil Rule and we are not required to decide whether or not the appellants are entitled to still function as the Managing Committee of the said school. Shib Charan Bhattacharya, the respondent No. 3, had been the Head Master of the said Purba Kalikata Vidyatan Higher Secondary School for Boys. On 30th November, 1974, he had attained the age of superannuation but he was granted three successive extensions of service by the Managing Committee of the school. The District Inspector of Schools, Secondary Education Calcutta by his Memo No. 835/G dated 15th October, 1977 had conveyed the approval to the extension of the service of Shib Charan Bhattacharya from 1st December, 1976 to 30th November, 1977. The District Inspector of Schools (SE) Calcutta in the said memo had stated that the case for further extension of his service should be submitted at least six months before he completed the said term of extension. He should in no case be allowed to continue in his service after he completed the 65 years of age.

2. On June 21, 1977 Shib Charan Bhattacharya, the respondent No. 3, made an application to the Secretary of the Purba Kalikata Vidyatan Higher Secondary School for Boys praying that steps might be taken to extend his service for the fourth term for a further period of one year with effect from 1st December, 1977. He annexed a medical certificate to his said application. The Managing Committee, however, did not immediately take up the said application of the respondent No. 3 for consideration. On October 15, 1977 the respondent No 3 made an application to the Director of Secondary Education, Government of West

Bengal for granting him extension of service for a period of one year from 1st of December, 1977. The District Inspector Schools, Secondary Education Calcutta had recommended that the services of the respondent No. 3 be extended for one year.

3. On 29th October, 1977, the appellants as the Managing Committee of the aforesaid school had resolved not to entertain the application for extension of service made by the respondent No. 3. The sole ground for refusal was that the respondent No. 3 did not submit his application for extension of service for the fourth term at least six months before the expiry of his previous term of extension. In the second paragraph of the said resolution dated 29th October, 1977 it was alleged that the respondent No. 3 had refused to obey ad-interim order of this Court dated 11th October, 1977. Therefore, the respondent No. 3 was directed to proceed on leave on full pay till 31st October, 1977. The Additional Deputy Director of Public Instruction, Secondary Education, West Bengal by his Memo dated November 17, 1977 forwarded to the Secretary and the Head Master of the said school the following order dated 15th November, 1977 passed by the Director of Secondary Education West Bengal :

Considering the contention of the Secretary and Sri Shib Charan Bhattacharyya, Head Master, Purba Kalikata Vidyatan for Boys, Calcutta, along with other documents, the services of Sri Bhattacharyya as Head Master of the aforesaid school can be extended for period from 1-12-77 to 30-11-78 in terms of Rule 28(3) of the Government Order No. 1598-Edn (S) dated 15.7.69 read with Government Order No. 41-Edn. (S) dated 8.1.74 and No. 941-Edn (S) dated 7.6.76 (regarding Rules for Management of Recognised Non-Govt. Institutions (Aided and Un-aided) 1969).

4. On November 28, 1977 the appellants obtained Civil Rule No. 5808 (w) of 1977 *inter alia* challenging the said order of the Director of Secondary Education Government of West Bengal by which the service of the respondent No. 3 was extended up to November 30, 1978. His Lordship The Honble Mr. Justice Amla Kumar Mookerji discharged the said Rule. The appellants, being aggrieved, by the said judgment has preferred this appeal under clause 15 of the Letters Patent. Mr. B. P. Banerjee, learned advocate for the appellants, has submitted before us that the Circular No. 21 dated December 12, 1952 issued by the Board of Secondary Education, West Bengal was applicable in the matter of extension of service of the respondent No. 3. The respondent No. 3 admittedly did not apply for the fourth extension of his service atleast six months before the expiry of his previous extension, therefore his extension application was not at all entertainable. Secondly, Mr. Banerjee, has submitted that the Director of Secondary Education did not give any opportunity of hearing to the Managing Committee of the School before

granting extension of service to the respondent No. 3 for a term of one year from 1st of December, 1977. The Director of Secondary Education in his impugned order dated November 15, 1977 made an error apparent on the face of the record when he stated that he had considered the contention of the Secretary. In fact, the Secretary or the Managing Committee of the school was not given any opportunity to make either written or oral submissions before the Director of Secondary Education, West Bengal. Lastly, Mr. Banerjee submitted that the Director of Secondary Education did not record his reasons for extending the services of the respondent No. 3 as the Head Master of the school from 1st December, 1977 to 31st of November, 1978.

5. Purba Kalikata Vidyatan Higher Secondary School for Boys is an aided institution. Rule 28 of the Rules for Management of the Recognised Non-Government Institutions (Aided and Un-aided) 1969 *inter-alia* contains provisions for extension of services of teachers and other employees of aided institutions beyond the date of superannuation. Under clause (iii) of sub-rule (1) of Rule 28 of the said Rules the Managing Committee of an aided institution has power to extend the services of teachers and other employees beyond the date of superannuation, approval for such extension being thereafter sought for from the Director or any officer authorised by him ordinarily within a week from the date of decision of the Managing Committee. In case, the officer authorised by the Director under sub-rule (1) of Rule 28 does not approve of the appointment or extension of service as the case might be under sub-rule (2) of Rule 28 he shall refer the case to the Director and in case of disapproval of any appointment or extension of service the Director or the officer authorised by him shall communicate to the Committee the reasons therefor. It may be noted that under the said sub-rule (2) in case the Director or the officer authorised by him turns down the recommendation of the Managing Committee for extension of service, reasons therefor must be communicated to the committee. But in case the recommendations of the Managing Committee are accepted no reasons therein need be given. Further, clause (iii) of sub-rule (1) of Rule 28 of the Rules for Management of Recognised Non-Government Institutions (Aided and un-aided), 1969 does not prescribe any time limit for making an application to the managing Committee by a superannuated teacher or other employee for extension of service. The sub-rule (3) of Rule 28 provides that in case the Committee does not recommend extension of the service of a teacher or an employee under clause (iii) of sub-rule (1) of Rule 28, it shall record specific reasons therefor and the person concerned may make his representation to the Director through the District Inspector/Inspectress of schools and the decision of the Director in the matter shall be final.

6. In view of the above provisions of the Management of Recognised Non-Government Institution (Aided and Un-aided) Rules, 1969 we are unable to accept the submission of the learned advocate for the appellants that the appellants had acted in accordance with law by refusing to entertain the application of the respondent No. 3 for extending his services from 1st December, 1977 on the ground that his application was a belated one. The above statutory rules do not prescribe any time limit and the Circular No. 21 dated 12th December, 1952 issued by the Board of Secondary Education cannot over-ride or modify the said statutory rules relating to extension of services of teachers and other employees of aided institutions recognised by the West Bengal Board of Secondary Education. Under Rule 28 in the case of an aided institution, the Director of Secondary Education or the officer authorised by him would be the approving authority in the matter of appointment and extension of services of teachers and employees of the aided institutions. The West Bengal Board of Secondary Education under Rule 28(4) is now the approving authority in respect of appointment and extension of services of the teachers and other employees of only unaided institutions. When the Circular No. 21 dated 12th December, 1952 upon which Mr. B. P. Banerjee, learned advocate for the appellants, relied was issued no statutory Rules existed. The said Circular required the approval of the West Bengal Board of Secondary Education for appointing and for extension of service of the staff of the recognised schools. At present the said circular in terms applies to the aided institutions only to the extent it is not inconsistent with the statutory law. The procedure prescribed by the said Circular may be substantially followed in the matter of extension of service of teachers and other employees of aided institutions. But the requirement of the said Circular that an application for extension of service must be made at least six months before the date of superannuation or before the expiry of the period of extension already granted cannot be considered to be mandatory. The object of providing a time limit was presumably to facilitate a timely consideration and disposal of matters relating to extension of services of a teacher or an employee of the aided institution. The clause (iii) of Rule 28(1) does not prescribe any time limit and the use of the expression "ordinarily within a week" clearly denotes that in a large majority of cases or generally but not invariably the Managing Committee should seek the approval of the extension of services of teachers and other employees within seven days from the date of decision of the Committee. In the above view of the matter we reject the first submission of the learned advocate for the appellants that the time limit of six months as laid down in the Circular No. 21 dated 12th December, 1952 applied in case of the extension of services of the respondent No. 3 who was a teacher of an aided institution. The learned advocate for the appellants submitted that the District Inspector of Schools while conveying approval

to the extension of service of the respondent No. 3 upto 30th November 1977 had stipulated that the case for his further extension should be atleast six months before he would complete the said term of extension. The said memo did not make any reference to the last date for making an application by the teacher concerned to the Managing Committee of the school and also the District Inspector of Schools could not over-ride or vary the provisions relating to extension of service as contained in Rule 28 mentioned above.

7. The Director under sub-rule (3) of Rule 28 of the Rules for the Management of Recognised Non-Government Institutions (Aided and Un-aided) 1969 has the appellate or revisional power. The said power of the Director under sub-rule (3) may not be strictly considered a quasi-judicial one. But in our view, in disposing of a representation made against refusal of the Managing Committee to extend the service of a teacher or an employee the Director is required to observe rules of fairplay. The Director is also required to consider the relevant facts and circumstances relating to the extension of services of the teacher or employee concerned. Therefore, although the Director under sub-rule (3) is not required to hold an elaborate enquiry, he should give adequate opportunities to the Managing Committee which did not recommend extension of service of the teacher concerned and to the aggrieved teacher who has made the representation in question. The representation need not consist of a personal hearing but both sets of parties ought to have at least opportunities to submit in writing their respective cases before the Director disposes of the representation made under sub-rule (3) of Rule 28. Further, although sub-rule (3) does not expressly require the Director to record his reasons in his decision disposing of such a representation, having regard to the nature of his statutory powers and the consequences thereof, the Director is required to briefly record his reasons in order to indicate that he had applied his mind to relevant facts and circumstances and did not act arbitrarily or capriciously. The sub-rule (3) of Rule 28 enjoins that the Managing Committee must record specific reasons for not recommending the extension of the services of a superannuated teacher or an employee. The Director of Secondary Education under the said sub-rule is authorised to entertain and dispose of the representation of a teacher or an employee who has not been granted extension of his service by the Managing Committee. Therefore, it is incumbent upon the Director to record briefly his reasons for allowing such a representation and for over-riding the decision of the Managing Committee.

8. We may now proceed to consider the facts of the present case. The original records from the office of the Director, Secondary Education, West Bengal were placed before us. Copies of the note-sheets of the said records contained in File No. 4G/198/CA/70 have also

been filed. Both parties have agreed that the said extracts records may be kept with the records of this court in order to enable this Court to pronounce its judgment. It is no longer disputed that the Director of Secondary Education did not issue any notice upon the appellants to show-cause why the representation of the respondent No. 3 should not be allowed and the Director did not also formally give any hearing to the parties. After the representation of the respondent No. 3 was received, the District Inspector of School (S.E.) Calcutta had addressed two memos respectively dated 1st November and 14th November, 1977. The said District Inspector had recommended that respondent No. 3 may be given the extension for the fourth term. The District Inspector also pointed out that the Managing Committee did not recommend his case. The District Inspector in his second memo dated 14th November, 1977 had referred to the letter of the Secretary of the school addressed to the respondent No. 3 asking him to hand-over charge to the Secretary and asking him to proceed on leave. The grounds for refusal by the Managing Committee were also mentioned by the District Inspector in his memo. Mr. Amitabha Chowdhury, learned advocate for the respondent No. 3, has drawn our attention to the fact that the Secretary of Purba Kolikata Vidyatan for Boys had forwarded both to the Director, Secondary Education, West Bengal and the District Inspector of Schools, Secondary Education, Calcutta copies of the letter dated 1st November, 1977 addressed to the respondent No. 3. The Secretary of the School in the said letter had conveyed the decision of the Managing Committee of the school not to grant the fourth extension of service to the respondent No. 3 on the ground that his application was not submitted atleast six months before the expiry of his third term of extension. The Secretary while forwarding the said copies to the Director of Secondary Education had explained that no action on the application of the respondent No. 3 for fourth extension could be taken earlier because the approval from the District Inspector of Schools for his third term was received only on 17th October, 1967. An employee named C. L. Halder of the office of the Director of Secondary Education stating the aforesaid facts had put up a note dated 15th November, 1977. A. Dutta placed the said note with the recommendation to the Director Secondary Education that the respondent No. 3 be granted one years extension. It was *inter-alia* stated in the said note that the respondent No. 3 was a retired government servant in W. B. E. S. "The reasons for refusal of extension shown by the present m/c (which was superseded by the Board but has again come in power by an injunction order of the High Court.) do not appear to (sic) be) tenable. The case has been recommended by the D. I. S. (S. E.), Calcutta...Extension for one year can be granted". Thereupon, on 15th November, 1977 Sri S. N. Ghosal, Director, Secondary Education recorded the following order in the file :—

“Extension of the services of Sri S. C. Bhattacharyya as H. M. of Purba Kalikata Vidyalaya for one year w. e. f. 1.12.77 as proposed may be granted.”

It may be noted that the Director in the original order did not record any reason and did not even state that he had considered the views of the Managing Committee for refusing extension of service of respondent No. 3 for the fourth term. We have already mentioned that in his memo dated 17th November, 1977 the Director, however, had mentioned “Considering the contention of the Secretary and Sri Snib Charan Bhattacharyya, Head Master...along with other documents, the services of Sri Bhattacharyya.. is extended...for the period from 1.12.77 to 30.11.78.”

9. It is not disputed that a copy of the resolution of the Managing Committee together with the explanatory notes of the Secretary of the school was forwarded to the Director of Secondary Education. The District Inspector of schools (S.E.) Calcutta had also submitted his reports which referred to the stand taken by the Managing Committee for refusal of the extension of service to the respondent No. 3. The records produced before us indicate that all these relevant materials were placed before the Director of Secondary Education before he passed his said order granting the extension of services of the respondent No. 3. The Managing Committee had refused to extend the services of the respondent No. 3 only on the ground that his application was a belated one and the Managing Committee did not consider the eligibility and fitness of the respondent No. 3 for obtaining fourth extension. We have already indicated that the ground given by the Managing Committee for not entertaining the said extension application of the respondent No. 3 was not tenable. Therefore, in the facts of this case there was no failure of justice because of absence of any formal notice upon the Secretary of the Managing Committee of the school to submit their representations against the prayer of the respondent No. 3 for granting him extension of service. The view of the Managing Committee embodied in its resolution dated 29th October, 1977 and in the forwarding letter of the Secretary of the school was placed before the Director of Secondary Education. Therefore, we are not prepared to strike down the impugned order of the Director of Secondary Education on the said ground.

10. Director of Secondary Education neither in his order recorded in the file nor in the memo conveying the extension order has recorded his reasons. But, the fourth extension of service granted to the respondent No. 3 is due to expire shortly, i. e., 30th November 1978. In case, we set aside the impugned order of extension of the services of the respondent No. 3, we shall have to remit the question of extension of services of the respondent No. 3 again to the Director of Secondary Education. We have already indicated that the Managing Committee relying on the Circular No. 21 dated 12th December, 1952 of the West Bengal Board of

S. P. M.

*Civil Revision Case No. 4081 of 1973.

of the amount of rent admitted to be due from the tenant-defendant to the landlord-plaintiff was made within one month from the date of service of summons. The summons was served on the defendant on 23.4.73 and the said application of the defendant-tenant was made in the trial court on 23.5.73. The Trial Court took the view that as the admitted rent due had not been put in within the prescribed time, the application was not maintainable. Hence the question is whether the said application was maintainable.

HELD : *An application made under section 17(2A) of the West Bengal Premises Tenancy Act can not be held to be not maintainable on the ground that the defendant-tenant had failed to deposit the amount of arrear rent due from him to his landlord within one month from the date of service of the summons on him. In other words, when an application under sections 17(2) and 17(2A) was made without deposit or payment of the admitted amount of rent due from the tenant, the failure to deposit such amount would not be fatal to the said application.*

In the said application under sub-section (2) and (2A), the defendant-tenant besides praying for extension of time to deposit the amount of rent in arrear and for determination of the amount due from the tenant to the landlord, asked for further relief by way of instalments. In this connection it may be pointed out that payments by instalments may be asked for under clause (b) of sub-section (2A) of section 17 of the Act but clause (b) applies only to the amount required to be deposited or paid under sub-section (1) of section 17. The said clause (b) has no application to the amount to be deposited under sub-section (2) of section 17. That being the position, the prayer for payment by instalments, as made in the instant case, is not sustainable in law.

Cases referred to :—

- (1) *Sri Sarada Sangha v. Asoka Sengupta*, 76 CWN 862
- (2) *Mukherjee S. K. v. Saila Bala Sen & Ors.*, 77 CWN 492
- (3) *Kazi Abdul Hossain v. Fazlur Rahman & Bros*, 78 CWN 579
- (4) *Hindusthan Industrial v. Chandi Prasad More*, 79 CWN 1017
- (5) *Basab Basu & Ors. v. Bupati Ranjan Sen*, 80 CWN 350
- (6) *Maliram Agarwala v. Bhudarmal Agarwala*, 78 CWN 901
- (7) *Bhagwan Shaw v. Smt. Simmi Goyal*, 1978 (2) CLJ 254
- (8) *Pulin Kumar Chowdhury v. Sachindra Mohan Bose & Ors.*, 1978 CHN 774 : 1978 (1) CLJ 645

<i>Bimal Kanti Bose</i>	...	...	...	<i>for the Petitioner</i>
<i>Sudhir Dutt</i>	...	...	...	<i>for the Opposite party</i>

The judgment of the Court was as follows :—

In this Rule what is assailed is order No. 16 dated August 14, 1973 made by the Munsif, Third Court at Howrah while disposing of an application made on behalf of the defendant-petitioner under sections 17(2)

and 17(2A) of the West Bengal Premises Tenancy Act, 1956, (hereinafter referred to as the said Act).

2. In the present case admittedly there was rent due from the defendant tenant to the plaintiff-landlord in respect of the period from September, 1972 till March, 1973. The case of the plaintiff was that the defendant was in arrear from November, 1970 to August, 1972 at the time when the suit was filed. The case of the defendant on the other hand was that he was inducted as a tenant in August, 1972, that he paid rent for the month of August, 1972 but got no receipt therefor and that as the landlord was not agreeable to grant any receipt, he could not pay rent since September, 1972.

3. In the circumstances aforesaid, the defendant made a composite application under sections 17(2) and 17(2A) of the West Bengal Premises Tenancy Act praying for determining the amount of rent due from him, for extending the time for putting in such amount and for granting instalments to put in the amount of rent that will be found due from him.

4. The only question raised before me in this case is whether the learned Munsif was justified in holding that the application was not maintainable in view of the fact that no deposit of the amount of rent admitted to be due from the tenant-defendant to the landlord-plaintiff was made within the period of one month from the date of the service of summons on him. The summons was served on the defendant on April 23, 1973 and the said application was made before the learned Munsif on May 23, 1973.

5. The learned Munsif took the view that as the amount of rent admitted to be due was not put in within the period aforesaid, the application was not maintainable. So the question for determination in this case is whether the learned Munsif was justified in holding that the application was not maintainable.

6. The learned lawyer for the tenant-petitioner Mr. Bose relied on several decisions of this Court in support of his contention that when an application under section 17(2A) of the said Act is made within the period prescribed by the Statute, the amount of rent admitted to be due need not be deposited and that such amount was to be deposited within a month from the date of preliminary order referred to in section 17(2) of the said Act. He further contends that in such circumstances he may also pray for extension of the period to deposit the admitted amount of arrear rent.

7. The answer to the question raised in this case will depend on the legal effect of the provisions of sub-section (2A) of section 17 of the said Act. Said sub-section (2A) was introduced into the Act by the West Bengal Premises Tenancy (Amendment) Act (30 of 1969). As the determination of the question involved in this case will require a reference to

sub-sections (1), (2), (2A) and (2B) of section 17 of the said Act, it is considered proper to quote hereunder those provisions :

"17. When a tenant can get the benefit of protection against eviction.—(1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in section 13, the tenant shall, subject to the provisions of sub-section (2), within one month of the service of the writ of summons on him or where he appears in the suit or proceeding without the writ of summons being served on him, within one month of his appearance deposit in Court or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent per annum from the date when any such amount was payable up to the date of deposit, and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2). If in any suit or proceeding referred to in sub-section (1) there is any dispute as to the amount of rent payable by the tenant, the tenant shall, within the time specified in sub-section (1), deposit in court the amount admitted by him to be due from him together with an application to the court for determination of the rent payable. No such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable. On receipt of such application the court shall—

(a) having regard to the rate at which rent was last paid, and the period for which default may have been made, by the tenant, make, as soon as possible within a period not exceeding one year, a preliminary order, pending final decision of the dispute, specifying the amount if any, due from the tenant and thereupon the tenant shall, within one month of the date of such preliminary order, deposit in court or pay to the landlord the amount so specified in the preliminary order, and

(b) having regard to the provisions of this Act, make, as soon after the preliminary order as possible, a final order determining the rate of rent and the amount to be deposited in court or paid to the landlord and either fixing the time within which the amount shall be deposited or paid or, as the case may be, directing that the amount already deposited or paid be adjusted in such manner and within such time as may be specified in the order.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), on the application of the tenant, the Court may, by order,—

(a) extend the time specified in sub-section (1) or sub-section (2) for the deposit or payment of any amount referred to therein.

(b) having regard to the circumstances of the tenant as also of the landlord and the total sum inclusive of interest required to be deposited or paid under sub-section (1) on account of default in the payment of rent, permit the tenant to deposit or pay such sum in such instalments and by such dates as the Court may fix :

Provided that where payment is permitted by instalments, such sum shall include all amounts calculated at the rate of rent for the period of default including the period subsequent thereto up to the end of the month previous to that in which the order under this sub-section is to be made with interest on any such amount calculated at the rate specified in sub-section (1) from the date when such amount was payable up to the date of such order.

(2B) No application for extension of time for the deposit or payment of any amount under clause (a) of sub-section (2A) shall be entertained unless it is made before the expiry of the time specified therefor in sub-section (1) or sub-section (2), and no application for permission to pay in instalment under clause (b) of sub-section (2A) shall be entertained unless it is made before the expiry of the time specified in sub-section (1) for the deposit or payment of the amount due on account of default in the payment of rent."

8. Several decisions were referred to by the learned lawyers appearing on behalf of the petitioner and the opposite party and they will be considered in due course.

9. The non-obstante clause with which the sub-section commences "notwithstanding anything contained in sub-section (1) or sub-section (2)" would mean that the provisions contained in sub-section (2A) shall apply no matter what is there contained in sub-section (1) or sub-section (2). Under clause (a) of sub-section (2A), the court may extend the time specified in sub-section (1) or sub-section (2) for the deposit or payment of any amount referred to therein. The explicit and unambiguous language used in sub-section (2A) shows that the provisions of sub-section (2A) would apply to the time specified in sub-section (1) or sub-section (2) for the deposit or payment of any amount referred to therein and the court, therefore, may extend the time so specified when proper grounds are made out for such extension. Sub-section (1) makes it obligatory on the part of the tenant within one month of the service of writ of summons or where he appears in the suit or proceeding without the writ of summons being served on him within one month of his appearance to deposit in court or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in

which the deposit or payment is made together with interest thereon. This provision of sub-section (1) is made subject to those contained in sub-section (2). Under sub-section (2) if there is any dispute as to the amount of rent payable by the tenant, it is obligatory on the part of the tenant, within the time specified in sub-section (1), to deposit in court the amount admitted by him to be due from him together with an application to the court for determination of the rent payable. It is further provided that no such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable. The court on receipt of such an application shall make a preliminary order pending final decision of the dispute specifying the amount, if any, due from the tenant and the tenant shall thereupon, within one month of the date of such preliminary order, deposit in court or pay to the landlord the amount so specified in the preliminary order. Thereafter, according to the provisions of clause (b) of sub-section (2) a final order will follow. Having regard to the provisions referred to above it cannot but be held that the proper construction of those provision would be to enable the court to extend the time within which according to the provisions of sub-section (1) the rent in arrear and according to the provisions of sub-section (2) the amount which is admitted by the tenant to be due from him as also the amount which the court by its preliminary order and final order finds to be due from the tenant to the landlord is to be deposited or paid, as the case may be. It is of importance to note in this connection that the provision regarding extension of time as contained in clause (a) of sub-section (2A) makes no distinction between the amount admitted by the tenant to be in arrear and the amount which is determined by the preliminary or final order made by Court to be deposited or paid, as the case may be.

10. A different construction was put on the provisions of sub-section (2A) read with sub-section (2) by a few single Bench decisions of this Court. The decision that was referred to by the learned Advocate appearing for the opposite party is (1) *Sri Sarada Sangha v. Asoka Sengupta*, 76 CWN 862. In this case, the question of construction of sub-section (2A) was not raised. In a case where sub-section (2A) does not apply, the question whether failure to deposit the amount of rent admitted to be due from the tenant would render an application for determination of the amount of rent due from the tenant not-maintainable was decided by the Court in that case and the decision was that in such cases the application for determination of the amount of rent due from the tenant would be not maintainable. In that case, on a proper construction of the opening paragraph of sub-section (2) A.P. Das, J. took the view that the application for determination of rent payable by the tenant must be accompanied by a deposit of any admitted amount. It is significant to note that according to sub-section (2) the deposit

of the amount admitted to be due shall not be accepted unless it is accompanied by an application for determination of rent payable. The provision does not say that the application for determination of rent paid shall be accompanied by the deposit. Though, the provision of sub-section (2) does not require an application for determination of rent to be accompanied by a deposit of the admitted amount of rent, having regard to the other provisions of that sub-section it may perhaps be held that the application would become not maintainable in the absence of such deposit. But the position would be otherwise if an application under sub-section (2) and also an application under sub-section (2A) be made by the tenant without depositing the admitted amount of rent, for, as already indicated, the tenant may ask for extension of the time specified in sub-section (1) or sub-section (2) for deposit of any amount referred to therein and the court may thereupon grant the extension asked for. Thus, the decision in *Sri Sarada Sangh's* case (supra) has not much bearing on the question in issue in the present case.

11. In (2) *Mukherjee S.K. v. Saila Bala Sen & Ors*, 77 CWN 492, A.P. Das, J., held on a construction of the provisions of sub-section (2) and sub-section (2A) of section 17 of the said Act that the court had no power under sub-section (2A) to extend the time for depositing in court the amount admitted by the tenant to be due from him which he was required to deposit along with his application under sub-section (2). This view was taken by A. P. Das, J. on the following considerations. Firstly according to him, the amount referred to in sub-section (1) is not the same thing as the amount admitted by the tenant to be due from him which he is required to deposit in court along with an application under sub-section (2). How this consideration is relevant I fail to appreciate. Sub-section (2A) in general terms provides that no matter what is there in sub-section (1) or sub-section (2), the court may on the application of the tenant by an order extend the time specified in sub-section (1) or sub-section (2) for the deposit or payment of any amount referred to therein. The expression "any amount" would make it clear that whether the amount is an amount of arrear rent referred to in sub-section (1) or an amount admitted to be due from the tenant and referred to in sub-section (2) or an amount which is determined by the Court by a preliminary or final order to be due from the tenant to the landlord extension of the time to deposit the same may be asked for. Sub-section (2A) makes no such distinction as is referred to in the said decision in *Mukherjee S. K.* (supra).

12. The second consideration on which the learned Judge bases his decision is that the time for deposit of admitted rent is not specified in sub-section (2) but that is the same as in sub-section (1). I find it difficult to agree with the learned Judge in this regard. When in sub-section (2) the time referred to is that specified in sub-section (1) it cannot-

be said that period for deposit of admitted amount was not specified in sub-section (2). It is specified and it is the same period as that mentioned in sub-section (1). In the third place, I find it difficult to agree with the observation of the learned Judge that the time that can be extended under sub-section (2A) cannot refer to the time within which the admitted amount of rent which is in arrear is to be put in. According to the learned Judge, that may only mean the period within which the amount determined by the Court under clause (a) or clause (b) of sub-section (2) is to be put in. Sub-section (2A) does not warrant any such distinction as is sought to be made. Lastly, the learned Judge is of the opinion that the use of disjunctive "or" between the words sub-section (1) and sub-section (2) in clause (a) of sub-section (2A) makes it clear that the Court can extend the time specified in sub-section (1) for the purpose of deposit or payment of the amount mentioned in sub-section (1) and not for the purpose of deposit or payment of any amount referred to in sub-section (2) and vice-versa. How on a construction of the provisions of sub-section (2A) such a conclusion may be arrived at is not quite intelligible.

13. In the case of *Mukherjee S. K.* (supra), *Sri Sarada Sangha's* case (supra) was referred to, but as already stated by me the decision in *Sri Sarada Sangha's* case can have no application in the case of *Mukherjee S. K.* (supra) as the question of interpretation of sub-section (2A) was not raised in *Sri Sarada Sangha's* case.

14. Another case referred to by the learned Advocate for the opposite party is (3) *Kazi Abdul Hossain v. Fazlur Rahman & Bros.* 78 CWN 579. The head-note shows that R. Bhattacharyya J. who heard this case held that the application was rightly rejected by the trial court as the tenant did not deposit the admitted rent within the time along with an application under section 17(2) of the said Act as required by law. The head-note is wrong and misleading, inasuch as in that case as there was no prayer under sub-section (2A) regarding amount of arrear rent, the learned Judge without deciding whether the principle laid down in the case of *Mukherjee S. K.* (supra) was correct, rejected the application.

15. The case of (4) *Hindusthan Industrial v. Chandi Prasad More*, 79 CWN 1017 which was decided by a Division Bench of this Court was also referred to on behalf of the opposite party. The decision in this case also has no application to the facts and circumstances of the present case as there was no question of application of the provision of sub-section (2A) in that case. There, the Court was not invited to adjudicate on the amount of rent payable and no deposit was made under sub-section (2) and the application could not, therefore, be treated as one made under sub-section (2). In (5) *Basab Basu & Ors. v. Bhupati Ranjan Sen*, 80 CWN 350, A. P. Bhattacharyya J. following the decision in the said cases of *Hindusthan Industrial* (supra), *Mukherjee S. K.* (supra) and *Kazi Abdul Hossain* (supra) took the view that the court

had no power under sub-section (2A) to extend the time for deposit of admitted amount of rent due from the tenant. The foregoing discussions would show that the cases referred to were already discussed by me. Further, it may be reiterated that the case of *Kazi Abdul Hossain* (supra) did not decide the question that is now before me. The learned Judge while deciding the case of *Basab Basu & Ors.* (supra) pointed out that the observation made by S. K. Mukherjee J. in the case of (6) *Maliram Agarwala v. Bhudarmal Agarwala*, 78 CWN 901 was an obiter as the question covered by that observation was not necessary for determination of the issue raised in that case.

16. The view taken by me that when an application under sub-section (2) and sub-section (2A) was made without the deposit or payment of the admitted amount of rent due from the tenant, the failure to deposit such amount would not be fatal to the application finds support from the view maintained by Salil K. Dutta, J. in (7) *Bhagawan Shaw v. Smt. Simmi Goyal* 1978 (2) CLJ 254.

17. In (8) *Pulin Kumar Chowdhury v. Sachindra Mohan Bose & Ors.* 1978 Calcutta High Court Notes 774, C. Mukharjee J. rightly observed that sub-section (2A) of section 17 starts with the non-obstante expression notwithstanding anything contained in sub-section (1) or sub-section (2)" and that accordingly sub-section (2A) engrafts an exception on the provisions of sub-section (1) and sub-section (2) to the extent contained in sub-section (2A). In the case of *Maliram Agarwala* (supra) the question under discussion in the present case did not specifically arise but S. K. Mukherjee J. made the following observation :

"The case could well have been disposed of without answering a question of construction which was raised at the hearing, the question being whether the court had power under section 17(2A) of the West Bengal Premises Tenancy Act, 1956, to extend the time for depositing in court the amount admitted by the tenant to be due from him which he is required to deposit along with his application under section 17(2). In *S. K. Mukherjee v. Saila Bala Sen & Ors.*, 77 CWN 492, A. P. Das J. held that the court had no such power. When a case can be decided without answering a question of law, the court need not and often does not answer the question. If, however, the court is of opinion that the question has not been correctly answered in a decision of the High Court which is binding on subordinate courts and inferior Tribunals and the question is of general importance, there is a duty to speak."

18. Even if in spite of the aforesaid observation it be conceded that the observation of S. K. Mukherjee, J. is an obiter, the reasons advanced by him in support of the principle discussed by him may be taken into consideration in a case where the question which is in issue in the present

case arises. S. K. Mukherjea J. rightly pointed out while considering the power of the court under sub-section (2A) that it would be seen at once that the power conferred on the court is of the widest amplitude and that the non-obstante clause with which the sub-section opens, the specific reference to sub-section (2) and the deliberate use in clause (a) of the words "for the deposit or payment of any amount referred to therein" clearly indicate that by sub-section (2A), the legislature intended to mitigate the rigour not only of sub-section (1) but also of sub-section (2).

19. In this context it would be proper to note that when with a view to mitigating the rigour of law so far as the tenants are concerned the legislature in general terms confers on the court the power to extend the period mentioned in sub-section (1) and sub-section (2) there will be no justification on our part to draw any distinction between the amount mentioned in sub-section (1) and the different amounts mentioned in the different parts of sub-section (2). The obvious intention of the legislature was to give some protection to the tenants in the matter of deposits to be made within the time specified in sub-section (1) and different parts of sub-section (2). If, in such circumstances, any distinction be made in the matter of application of the provisions of sub-section (2A) between the case of deposit to be made under sub-section (1) and that of the deposit of the amount admitted to be in arrear by the tenant to be made by him in accordance with first part of sub-section (2) we shall be engrafting an exception on the provisions of sub-section (2A) which the language of that sub-section does not warrant.

20. The records of the suit will show that the application under sub-sections (2) and (2A) of section 17 of the said Act was made within the period mentioned in sub-section (2B) of that section.

21. In the said application under sub-sections (2) and (2A) the tenant besides praying for extension of time to deposit the amount of arrear rent and for determination of the amount due from the tenant to the landlord wanted the Court to grant instalment. In this connection it may be pointed out that payment by instalments may be asked for under clause (b) of sub-section (2A) of section 17 but clause (b) applies only to the amount required to be deposited or paid under sub-section (1) of section 17. Said clause (b) has no application to the amount to be deposited under sub-section (2) of section 17. So the prayer for payment by instalments as made in the present case cannot be allowed.

22. In view of the aforesaid discussions I am clearly of the view that an application made under sub-section (2A) of section 17 of the said Act cannot be found to be not maintainable on the ground that the tenant failed, within a month from the date of service on him of the summons, to deposit the amount of arrear rent due from him to the landlord.

23. The Rule is made absolute. The order impugned is set aside. The court below is to dispose of the application under sub-section (2) and (2A) of section 17 of the said Act according to law. There will be no order as to costs.

P. R.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Ganendra Narayan Ray

Decision : July 26, 1978

Tarakdas Mukherjee Petitioner
Versus

State of West Bengal & Ors. ... Respondents*

Essential Commodities Act (10 of 1955) Sec. 3(1) & 3(2) (f)—Order made under Sec. 3(2)(f)—Promulgation of W. B. Foodgrains Procurement (Levy) Order 1977—Delegation of power by Central Government to State Government—Whether ultra vires—Interpretation of Sec. 3(1) and Sec. 3(2)(f) of Act 10 of 1955 as amended by Amending Act—92 of 1976.

The petitioner challenges the vires of the West Bengal Foodgrains Procurement (Levy) Order 1977 promulgated by the State Government under the delegated power of the Central Government under the Essential Commodities Act 1955. The petitioner contends that there has been delegation of power under section 3(2)(f) of the Essential Commodities Act by the Central Government to the State Government and excepting the said power under section 3(2)(f) no other power has been delegated to the State Government.

The power conferred under section 3(2)(f) of the Essential Commodities Act, is only a specific power but the general power flows from the provisions of section 3(1) of the Act. That being so, even assuming that the West Bengal Levy Order 1977 could not have been promulgated under section 3(2)(f) of the Act the said Levy Order is quite valid in view of the general and wide powers delegated to the State Government under section 3(1) of the Act. Additionally, the West Bengal Levy Order although refers to a Table on the basis of the total quantity of land and nature thereof held by a person on the basis of average productivity of such land and as such it cannot be contended that the Levy Order is only land oriented and not stock-oriented and as such beyond the delegated powers under section 3(2)(f) of the Essential Commodities Act. In any event, after the said amendment of section 3(2)(f) it can no longer be contended that the West Bengal Levy Order 1977 has been promulgated beyond the delegated powers under section 3(2)(f) of the Essential Commodities Act and as such void and ultra vires.

*Civil Order no. 1665 (w) of 1978.

Cases referred to :—

- (1) *Binoy Kumar Routral v. State of Orissa*, AIR 1976 Orissa 138
- (2) *State of Kerala v. Annam*, AIR 1969 Kerala 38
- (3) *Deep Narayan Singh v. State of U. P.*, AIR 1977 NOC 113 (Allahabad)
- (4) *Atulya Kumar De v. Director of Procurement Supplies*, AIR 1953 Cal 548

Madan Mohan Mallick for the Petitioner
Mrinmoy Bagchi for the Respondents

The judgment of the Court was as follows :—

In the instant writ petition the Levy Order dated 19th January, 1978 passed by the Requiring Authority being the Progress Assistant, Khanda Ghosh Block directing the petitioner to deliver 141 quintals 14 kgs. paddy to the Procurement Agent named in the said order is under challenge.

2. The petitioner's contention is that he owns 20.42 acres of agricultural lands some of which are in the irrigated area and the rest are in the non-irrigated area. The petitioner's wife owns 8.43 acres and part of the said lands are in the irrigated area and the rest are in the non-irrigated area. The petitioner also contends that the petitioner is also shebait of Sri Sri Gopal Jew Thakur and the total area of the lands belonging to the said deity is 26.10 acres and the said lands were also situated partly in the irrigated and partly in the non-irrigated area. A provisional levy roll was published in Khanda Ghosh Anchal for the previous year wherein the petitioner's liability for levy was shown as 141 quintals. The petitioner made representation against the said levy roll. The matter was investigated and it was found that 14.76 acres were sandy lands where no paddy was grown and 38 acres were cultivated by bargadars. The petitioner states that it was found both by the Requiring Authority and the Appellate Authority in the said year that with great difficulty the petitioner delivered 100 quintals of paddy by purchasing the same from the market and the petitioner did not receive any paddy from his bargadars. The petitioner contends that the same situation continues for this year also and no bargadar was evicted by the petitioner. In spite of such facts, the petitioner was again directed to deliver 141 quintals of paddy by the said impugned order. The petitioner contends that the said order was passed without determining the actual stock of paddy held by the petitioner and such assessment of levy was made on the basis of total area of land held by the petitioner without any reference as to the total yield received from the said lands by the petitioner. The petitioner challenges the vires of the West Bengal Foodgrains Procurement (Levy) Order 1977 promulgated by the State Government under the delegated power of the Central Government under the Essential Commodities Act, 1955. The petitioner contends that there has been delegation of power under section 3 (2) (f) of the Essential Commodities Act by the Central

Government to the State Government and excepting the said power under section 3(2)(f) no other power has been delegated to the State Government.

3. Mr. Mallick the learned Counsel appearing for the petitioner contended that under the Essential Commodities Act, food crop is an essential commodity but the land has not been included as an essential commodity. Mr. Mallick contended that the impugned order of levy was absolutely illegal and without jurisdiction because such order was passed without any reference to the actual stock of foodgrains held by the petitioner. Mr. Mallick also contended that the West Bengal Foodgrains Procurement (Levy) Order, 1977 is *ultra vires* the Essential Commodities Act inasmuch as the provision for assessment of levy is based on the quantum of different types of land held by a person but not on the basis of actual stock held by such person. Mr. Mallick in this connection referred to a decision of the Orissa High Court made in the case of (1) *Bijoy Kumar Routrai and others v. State of Orissa and others*, reported in AIR 1976 Orissa 138. The Division Bench of the Orissa High Court took into consideration of the provisions of Orissa Paddy Procurement (Levy) Order, 1974. It was held in the said decision that the basic provision in the Orissa Paddy Procurement (Levy) Order 1974 imposing a levy on the basis of 'land holding' is not in conformity with section 3(2)(f) of the Essential Commodities Act under which the demand of levy is relatable to holding in stock. Consequently direction for sale as provided by the said order can only be in relation to the stock in the hands of the landholder and he cannot be subjected to a direction for sale of a quantity of paddy calculated on the basis of the acreage of land subjected to paddy cultivation. It was further held that the impugned provision of the Levy Order cannot be justified on the ground that the power to make the order is vested in the Central Government under sub-section (1) of section 3 and, therefore, the order is not in pursuance of power under sub-section (2). This is so because the State Government is a delegated authority and its powers are those that are delegated to it by the Central Government under section 5 of the Act. Referring to the aforesaid decision of the Orissa High Court, Mr. Mallick contended that the West Bengal Foodgrains Procurement (Levy) Order is also land-oriented and not stock-oriented. Accordingly the said West Bengal Levy Order is also illegal and void and was promulgated without any proper authority on the part of the State Government under the delegated powers from the Central Government.

4. Mr. Mrinmoy Bagchi the learned Counsel appearing for the respondents however contended that the West Bengal Paddy Procurement (Levy) Order, 1977 is not similar to the Orissa Paddy Procurement (Levy) Order, 1974 and as such the decision made by the Orissa High Court has no manner of application to the West Bengal Levy Order. Mr.

Bagchi further contended that the West Bengal Levy Order is not land-oriented but it is essentially stock-oriented. There is however reference of the land holding for the purpose of calculating the probable stock by the person concerned. Mr. Bagchi also referred to a Full Bench decision made in the case of (2) *The State of Kerala & Ors. v. Annam and others*, reported in AIR 1969 Kerala page 38. In the said decision, the Kerala Rice and Paddy (Procurement by Levy) Order (1967) was challenged. It was held by the Full Bench of the Kerala High Court in the said decision that a law designed to meet famine conditions cannot afford to be so liberal. Its provisions must be capable of drastic application to meet all situations. The expression "any person holding in stock any essential commodity" must, in the context, comprehend all persons having possession of any appreciable quantity of the commodity and the expression 'Stock' in section 3(2)(f) of the Essential Commodities Act appears to mean a collection or store. When a crop of paddy is harvested, threshed and the harvesting workers' charges are paid what the cultivator takes thereafter is his 'stock' of paddy within the meaning of section 3 (2) (f) of the Essential Commodities Act. Relying on the aforesaid decision of the Kerala High Court Mr. Bagchi contended that actual weighing of the stock of paddy is not required to be made and the Levy Order providing assessment of levy in respect of a stock reasonably expected to be received by a cultivator, cannot be said to be a land-oriented Order but the Levy Order in such circumstances must be held as basically stock-oriented. Mr. Bagchi contended that in appropriate case, the reasonable expectation of the yield may not come true but there are provisions for preferring objections against normal assessment on the ground of failure of normal yield by the owner of the stock in question in the impugned Levy Order itself. Mr. Bagchi further contended that the Essential Commodities Act has been amended by the amending Act 92 of 1976. By the aforesaid amendment, Section 3(2)(f) has undergone a change, and there has been specific addition in the provisions of section 3(2)(f). From the amended provisions it will appear that after the expression "holding any stock", the expression "or engaged in production" has been added. Accordingly, Mr. Bagchi contended that in any event after the said amendment in 1976 the West Bengal Foodgrains Procurement (Levy) Order, 1977 cannot be challenged as an enactment beyond the delegated authority under section 3(2) (f) of the Essential Commodities Act. Mr. Bagchi contended that for the aforesaid reason, in any event, the decision of the Orissa High Court as referred to hereinbefore cannot have any manner of application even assuming but not admitting that the West Bengal (Levy) Order is basic land oriented. Reference was also made by Mr. Bagchi to the decision made in the case of (3) *Deep Narayan Singh v. State of U.P.*, reported in AIR 1977 NOC 113 (Allahabad). It was held by the Allahabad High Court in the said decision that

by 1972 Notification, the Central Government delegated all its powers under the general provision of section 3(1) as well as its specific powers under the various sub-clauses of section 3(2) which are only illustrative in nature and do not exhaust the general powers under section 3(1) to make orders and therefore any matter even if not falling within section 3(2) would be protected by section 3(1). Relying on this decision Mr. Bagchi contended that even assuming that after the amendment, the West Bengal Levy Order is not in conformity with the specific powers delegated under section 3(2)(f) of the Essential Commodities Act, the competence of the State Government to enforce the Levy Order cannot be challenged because of the wide and general powers under Section 3(1) of the Essential Commodities Act. Mr. Bagchi also referred to the decision made in the case of (4) *Atulya Kumar De v. The Director of Procurement Supplies*, reported in AIR 1953 Calcutta page 548. The vires of the West Bengal Foodgrains (Intensive Procurement) Order was examined in the said case and Sinha, J. (as his Lordship then was) held that power under the Essential Supplies (Temporary Powers) Act, 1946 is derived from section 3, sub-section (1) and the provisions of sub-section (2) are merely illustrative. Although the State Government cannot promulgate an order to acquire stock not already held under section 3(2)(f), it can be done under the general powers under section 3(1). Mr. Bagchi submitted that the provisions of section 3(1) of the Essential Supplies (Temporary Powers) Act, 1946 are parimateria similar to those of section 3(1) of the Essential Commodities Act.

5. It appears to me that the submissions made by Mr. Bagchi are of substance. Power under section 3(2)(f) is only a specific power but the general power flows from the provisions of section 3(1) of the Essential Commodities Act. Hence, even assuming that the West Bengal Levy Order could not have been promulgated under section 3(2)(f) of the Essential Commodities Act the said Levy Order is quite valid in view of general and wide powers delegated to the State Government under section 3(1) of the Act. I am also of the view that the West Bengal Levy Order although refers to a table on the basis of total quantity of land and nature thereof held by a person such table is really referable to normal stock reasonably expected to be held by a person on the basis of average productivity of such land and as such it cannot be contended that the Levy Order is only land-oriented and not stock-oriented and as such beyond the delegated powers under section 3(2)(f) of the Essential Commodities Act. In any event, after the said amendment of section 3(2)(f) it can no longer be contended that the West Bengal Levy Order, 1977 has been promulgated beyond the delegated powers under section 3(2)(f) of the Essential Commodities Act and as such void and ultra vires. Accordingly the writ petition fails and is dismissed. But in the special facts of the case, there will be no order as to costs.

6. It appears that the petitioner having intended to challenge the vires of the West Bengal Foodgrains Procurement (Levy) Order 1977 did not prefer any appeal or revisional application under Levy Order but moved the instant writ petition. As the Rule is discharged on the finding that the Levy Order is not ultra vires, it is but desirable that the petitioner should be given opportunity to prefer an appeal under the Levy Order challenging the correctness of the order of the Requiring Authority on merits particularly in view of the fact that similar assessment in previous year was found by the Appellate Authority as excessive. It is, therefore, directed that the petitioner will be entitled to prefer an appeal under the Levy Order within a month from today and if such appeal is preferred, the appellate authority will dispose of such appeal on merits.

P. R.

[CIVIL APPELLATE JURISDICTION]
Before Mr. Justice Anil Kumar Sen and Mr. Justice
B. C. Chakrabarti

Decision : August 31, 1978

Hind Galvanising & Engineering Co. (P) Ltd. ... Appellant
Versus

State of West Bengal & Ors. ... Respondents*

Industrial Disputes Act (14 of 1947) Sec. 33(2)(b)—Proceeding pending before Tribunal in respect of dispute between company and workmen—Dismissal of a workman without payment and approval of Tribunal—Effect thereof on Order of dismissal of workman—Additional privilege to workman of raising a dispute—Complaint u/s. 33A—Challenge as to validity of order of dismissal—Principles of natural justice, how far attracted—Joint disciplinary enquiry of two delinquents—Whether Statement of one can be used as corroborative evidence against another—Question of prejudice—Right of employer to establish charges independently before Tribunal where the employer has failed to establish charges in domestic enquiry according to the Tribunal.

In a case where two persons had faced a joint disciplinary enquiry, a question arose as to whether the statement of one for corroboration of evidence against the other would amount to a breach of the principles of natural justice.

Deoraj with his helper Sitaram was working on a shearing machine at the works of the appellant. An incident happened on 5.1.68. It is alleged that owing to the gross negligence and carelessness in the discharge of their duties these two workers wrongly sheared 28 pieces

*F. M. A. no 177 of 1977 arising out of Civil Rule no. 6434 of 1969.

which were totally rejected and as a result the appellant company suffered financial losses. This particular incident was also not reported to the superior authority by Deoraj but it was detected later on by a foreman on a report from Sitaram. On those allegations Deoraj was served with a charge-sheet. Deoraj submitted an explanation denying the charges. A similar charge sheet was also given to Sitaram and both faced a joint disciplinary enquiry which was directed by the appellant when the appellant was not satisfied with the explanation furnished. An outsider was appointed as the enquiry officer who held an enquiry and submitted his report. He found that the charges levelled against both the delinquents had been established at the enquiry on the evidence led by the appellant. The report read as a whole goes to show that the enquiry officer based his findings on the substantive evidence of the three witnesses though he used the Statement of Sitaram made at the enquiry for corroboration of the evidence of those three witnesses. Agreeing and accepting the findings of the enquiry officer, the appellant dismissed Deoraj from service. True it is that at the time when Deoraj was so dismissed an adjudication proceeding between the appellant and its workman was pending before an Industrial Tribunal and in spite thereof the appellant had not complied with the requirements of the proviso to section 33 (2) (b). Deoraj thereafter lodged a complaint with the Tribunal under section 33A seeking reinstatement with back wages. In that application it was claimed that he had been dismissed vindictively and mala fide and that the enquiry that was held was an eye-wash since there was gross violation of the principles of natural justice. The Tribunal held that there was no fair and proper enquiry and rejected the domestic enquiry and further directed reinstatement with back wages. The appellant company moved a writ petition before this court and obtained a Rule which was ultimately discharged. Hence this appeal.

HELD : It appears that Deoraj was dismissed by the appellant-company at a time when an industrial dispute between the appellant company and its workman was pending adjudication before an industrial tribunal. Such a dismissal undoubtedly was made in contravention of the provisions of section 33 (2) (b) when the company had neither paid to Deoraj wages for a month nor had obtained the requisite approval. But such contravention does not render the Order of dismissal void or inoperative. It only furnishes an additional privilege to the workman of himself raising a dispute in respect of the validity of such dismissal before the tribunal by lodging a complaint under section 33A apart from the other remedy under section 10 of the Act. And Deoraj availed of this remedy under section 33A when he lodged the complaint before the tribunal. In adjudging the complaint so made, the tribunal is to decide as to whether the order of dismissal can be sustained in law. The Order will not fail

solely on the ground that it had been made, in contravention of section 33 (2) (b). The tribunal is to find out whether the Order complained of had been passed on the basis of a fair disciplinary enquiry and whether it is otherwise bonafide and in accordance with the Standing Orders or not, what the principles of natural justice enjoin are not matters of technicality. One is to adjudge with reference to the substance as to whether these has been any real violation of such principles.

The Statement of Sitaram was used by the enquiry officer for the purpose of corroborating the substantive evidence led by the three witnesses on behalf of the company it would not be inadmissible as against the co-delinquent solely on the ground that Sitaram himself was a co-delinquent. It is settled law that domestic tribunals like enquiry officers are not bound by the technical rules of evidence contained in the Evidence Act. When the enquiry officer was not bound by the strict rules of the Evidence Act, it was certainly open to him to use the Statement of Sitaram as against the co-delinquent Deoraj and the only thing to be considered is whether by such use Deoraj had in any manner been prejudiced. The report of the Enquiry officer clearly shows that the charges against Deoraj were all independently established by the substantive evidence of the three witnesses examined on behalf of the company. The enquiry officer made a correct approval when he used the statement of Sitaram only for the purpose of finding corroboration.

It is now well settled that if in the view of the tribunal the domestic enquiry must fail, then in that event it would be still open to the employer to substantiate the charges on which action has been taken by him to the satisfaction of the tribunal on the independent evidence led before it.

Cases referred to :—

- (1) *Workmen of Motipur Sugar Factory Private Limited v. Motipur Sugar Factory*, AIR 1965 SC 1803
 - (2) *Punjab Beverage v. Suresh Chand*, 1978 LIC 693
 - (3) *Parry's Confectionary Limited v. Industrial Tribunal*, (1974) 45 FJR 329
 - (4) *Associated Cement Co. v. Labour Court*, 1976 (33) FLR 381
 - (5) *Cooper Engineering Ltd. v. P. P. Mundhi*, AIR 1975 SC 1900
- Chunilal Ganguly and Sunit Krishna Dutta* ... For Appellant
N. D. Manna and Subodh Kr. Bhattachaya ... For Respondent No. 3

The judgment of the Court was as follows :—

Sen, J. : This appeal under clause 15 of the Letters Patent is directed against the judgment and order dated February 18, 1974, passed by a learned single judge of this court dismissing a writ petition which was registered as Civil Rule No. 6434 (w) of 1969. The principal point that arises for consideration in this appeal is, where two persons had faced a joint disciplinary enquiry, use of the statement of one for corroboration of evidence against the other which constitutes breach of the

principles of natural justice. It would be necessary to refer to the facts which may be set out shortly as follows :

2. Respondent No. 3, Deoraj Rai with his helper Sitaram was working on a shearing machine at the appellant's works on January 5, 1968. It is alleged that owing to their gross negligence and carelessness in the performance of their duties they wrongly sheared 28 pieces which were totally rejected and as a result the appellant-company suffered financial losses. The matter was also not reported to the department-in-charge or any other superior authority by Deoraj, respondent No. 3 but was detected by the foreman after 6 p. m. on a report by Sitaram. On those allegations Deoraj was served with a charge sheet for a major misdemeanour dated January 9, 1968, on charge of (i) gross negligence of work, (ii) wilful and serious defect in workmanship, (iii) irresponsible action resulting in damage to the goods and (iv) failure to report at once to the foreman or supervisor or manager any defect noticed. On January 10, 1968, Deoraj submitted an explanation denying the charges. He took the defence that on January 5, 1968, while working on the shearing machine he reported defects to the supervisor who rectified the same and adjusted the gauge and after that he carried on the work of shearing on the gauge so adjusted. It was further pleaded that the charges were malafide and were drawn up with an ulterior motive to victimise him. There is no dispute that similar charges were framed against his helper Sitaram and both faced a joint disciplinary enquiry which was directed by the appellant when the appellant was not satisfied with the explanations furnished. One Mr. H. Pal, not associated with the appellant-company in any manner, was appointed the enquiry officer.

3. The enquiry was held on January 27, 1968 obviously in the presence of both Deoraj and Sitaram. Two of the supervisors on duty at the works upto 6 p. m. on January 5, 1968, namely M. R. Talukdar and Satyajit Mazumdar were examined along with the foreman B. N. Rai on behalf of the appellant in support of the charges. These three witnesses on their own evidence fully established the charges including the charge of gross neglect resulting in wrong shearing of 28 pieces and their rejection. Such evidence and in particular the evidence of the foreman disproved the defence of Deoraj that wrong shearing was due to any defect in the machine. It would appear further from the evidence of this foreman B.N. Rai that when asked by him Deoraj failed to furnish any explanation for the wrong shearing at that time while Sitaram in furnishing the reason stated in the presence of Deoraj that he was asked by Deoraj to complete the scheduled work quickly so that they could take more rest afterwards in spite of the fact that Sitaram pointed out that that may lead to mistakes.

4. The minutes of the domestic enquiry show that though offered for cross-examination none of these witnesses was cross-examined either by Deoraj or by Sitaram. On that very date both Deoraj and Sitaram

were examined by the enquiry officer. Sitaram in his statement made the same statement as he had earlier made to the foreman and he further stated that Deoraj did not inform about such wrong shearing to anybody including the supervisors present. Deoraj in his statement on the other hand reaffirmed his own defence, namely, that he noticed the defects during the operation and reported the matter to the supervisor who came and adjusted the gauge and that he proceeded with the shearing job on the gauge so adjusted. Neither of the two delinquents, however, adduced any evidence to substantiate their respective defences.

5. Deoraj made a representation to the manager of the appellant on the very date, namely, January 27, 1968, and obviously after the conclusion of the enquiry, complaining that the enquiry held was mala fide, unfair and against the principles of natural justice. The ground for such objection was that all the appellant's witnesses were present at the enquiry when the witnesses were being examined in chief and that the company's labour officer tampered with company's witnesses in presence of the enquiry officer. Such objections, however, were not raised before the enquiry officer and the minutes of the enquiry do not support any such complaint. The appellant in a letter dated February 6, 1968, strongly controverted those allegations made by Deoraj. It was pointed out that the labour officer in presenting the case of the company presented the witnesses one by one and it is not correct that all the witnesses were present when they were being examined. It was further pointed out that Deoraj himself refused to cross-examine any of those witnesses individually though opportunity was given to him for the said purpose. But Deoraj reiterated his previous complaint in a letter dated February 9, 1968. The appellant in their reply dated February 12, 1968, strongly controverted the allegations so repeated by Deoraj and further made a fair offer that if Deoraj felt it necessary they may hold another enquiry. That offer, however, was rejected by Deoraj by his letter dated February 15, 1968. But, even then, the appellant by their letter dated February 22, 1968, offered to hold a fresh enquiry on March 9, 1968, in case Deoraj wishes to avail that opportunity. This offer also was not accepted when the letter was returned as 'refused'.

6. In the background of such circumstances, the enquiry officer submitted his report. He found that the charges levelled against both the delinquents had been established at the enquiry on the evidence led by the appellant. The report read as a whole goes to show that the enquiry officer based his findings on the substantive evidence of the three witnesses though he used the statement of Sitaram made at the enquiry for corroborating the evidence of those three witnesses.

7. Agreeing with and accepting the findings of the enquiry officer, the appellant dismissed Deoraj from service by an order dated April 5, 1968. There is no dispute that at the time when Deoraj was so dismissed

an adjudication proceeding between the appellant and its workmen was pending before the tribunal and in spite of such pending proceeding the appellant had not fulfilled the requirements of the proviso to section 33(2)(b). Respondent No. 3, Deoraj, thereupon lodged a complaint with the tribunal under section 33A seeking reinstatement with back wages. In this application it was claimed that he had been dismissed vindictively and malafide and that the enquiry that was held was an eye-wash since there was gross violation of principles of natural justice.

8. The appellant contested the said proceeding by filing a written statement denying all the allegations made in the complaint lodged by the respondent No. 3, Deoraj.

9. The tribunal held that there was no fair and proper enquiry. According to the tribunal the enquiry officer infringed the rules of natural justice by using the statement of Sitaram against Deoraj when that statement was neither read over and explained to Deoraj nor was he given any opportunity to cross-examine Sitaram. On this ground alone, the tribunal rejected the domestic enquiry and then proceeded to observe that when the appellant had not proved the charges against Deoraj before the tribunal by adducing independent evidence, the dismissal must be held to be not justified. The tribunal, therefore, directed Deoraj to be reinstated with back wages.

10. The award of the tribunal so made was challenged by the appellant in the writ petition out of which the present appeal arises. In the writ petition, the appellant sought to make out a case that the award of the tribunal suffers an error apparent on the face of the record when it was held that use of the statement of Sitaram as made at the domestic enquiry constitutes any breach of the rules of natural justice. The learned judge in disposing of the writ petition, however, overruled the said plea of the appellant and for the same reasons as given by the tribunal upheld the award. The writ petition was accordingly dismissed and the Rule issued thereon was discharged. Feeling aggrieved, the appellant has preferred the present appeal.

11. Mr. Ganguli, appearing in support of this appeal has raised two points. In the first place according to Mr. Ganguli, the enquiry officer had rightly used the statement of Sitaram for corroborating the substantive evidence on which rests the findings and such user of the statement of Sitaram does in no way infringe the principles of natural justice. According to Mr. Ganguli when respondent No. 3 himself had rejected the offer of a fresh enquiry, there can be no case of any such infringement and the tribunal is in error on the face of the record in arriving at a finding to the contrary. Secondly, it has been contended by Mr. Ganguli that even if the domestic enquiry fails on that ground, the tribunal should have allowed the appellant an opportunity to adduce independent evidence to prove the charges levelled against respondent

No. 3, Deoraj to the satisfaction of the tribunal ; the tribunal could not have held the dismissal to be unjustified only because the appellant at the initial stage had not adduced independent evidence in proof of the charges levelled against respondent No. 3, Deoraj. According to Mr. Ganguli, the learned trial judge failed to appreciate these apparent infirmities in the award of the tribunal in dismissing the writ petition.

12. Mr. Manna appearing on behalf of the respondent No. 3 has contested both the points raised by Mr. Ganguli. According to Mr. Manna, Sitaram was a co-delinquent and the tribunal could not have used his statement made at the enquiry as against Deoraj when such a statement was neither read over and explained to Deoraj nor was he called upon to cross examine him on the statement so made. According to Mr. Manna, therefore, the tribunal had rightly held that the enquiry officer went wrong in relying upon such statement of Sitaram as evidence against Deoraj and the same constitutes breach of the fundamental principles of natural justice. In answer to the second point raised by Mr. Ganguli, Mr. Manna has contended that the appellant is not entitled in law to be given any second opportunity to adduce independent evidence in proof of the charges against Deoraj to the satisfaction of the tribunal. According to Mr. Manna, the appellant should have adduced such evidence at the initial stage if they are to fall back upon the alternative defence of supporting the dismissal on merits before the tribunal. Strong reliance is placed by Mr. Manna on the earlier decision of the Supreme Court in the case of (1) *Workmen of Motipur Sugar Factory Private Limited v. Motipur Sugar Factory*, AIR 1965 SC 1803.

13. We have carefully considered the rival contentions put forward before us. In the present case respondent No. 3, Deoraj was dismissed by the appellant at a time when an industrial dispute between the appellant and its workmen was pending adjudication before the tribunal. Such dismissal undoubtedly was in contravention of section 33 (2) (b) when the appellant had neither paid to the respondent No. 3 wages for a month nor had obtained the necessary approval the application for approval filed before the tribunal being withdrawn. The Supreme Court in its latest decision in the case of (2) *Punjab Beverage v. Suresh Chand*, 1978 Labour and Industrial Cases 693 has settled the legal consequences of such contravention. It has been held that such contravention does not render the order of dismissal void or inoperative. It only furnishes an additional privilege to the workman of himself raising a dispute over the validity of such dismissal before the tribunal by lodging a complaint under section 33A apart from the other remedy under section 10 of the Act. Respondent No. 3, Deoraj in the present case availed of this remedy under section 33A when he lodged the complaint before the tribunal.

14. In adjudging the complaint so made, the tribunal is to decide as to whether the order of dismissal can be sustained in law. The order

would not fail solely on the ground that it had been made in contravention of section 33(2) (b). The tribunal is to find out whether the order had been passed on the basis of a fair disciplinary enquiry and whether it is otherwise bonafide and in accordance with Standing Order or not. In the present case respondent No. 3 challenged the order on the ground that there had been no fair enquiry when the enquiry officer infringed the basic principles of natural justice in holding the enquiry. The tribunal upheld the said objection when it held that the enquiry officer infringed such principles by using the statement of Sitaram as evidence against Deoraj, the respondent No. 3 though (1) the statement of Sitaram was not read over to Deoraj and (2) Deoraj was afforded no opportunity to cross-examine Sitaram. The learned Judge in the trial court in disposing of the writ petition took the same view. We are, however, unable to accept the view so taken. In our view what the principles of natural justice enjoin are not matters of technicality. One is to adjudge with reference to the substance as to whether there has been any real violation of such principles. Requirement of those principles being to give the delinquent a fair opportunity to meet what is being used against him and make out his own defence, we are only to see whether such an opportunity was in substance furnished or not. The statement of Sitaram which on our findings made hereinbefore was used by the enquiry officer for the purpose of corroborating the substantive evidence led by the three witnesses examined on behalf of the appellant would not be inadmissible as against the co-delinquent solely on the ground that Sitaram himself was a co-delinquent. It is settled law that domestic tribunals like enquiry officers are not bound by the technical rules of evidence contained in the Evidence Act. Even that Act under section 30 makes confession of a co-accused admissible as against others and some decisions have gone to the extent of expressing the view that even statements under section 342 of the Criminal Procedure Code made by a co-accused can be so used as against the others though there is some divergence in judicial opinion on the point. Be that as it may when the enquiry officer was not bound by the strict rules of the Evidence Act, it was certainly open to him to use the statement of Sitaram as against the co-delinquent Deoraj and only thing to be considered is whether by such use Deoraj had in any manner been prejudiced. Such was the view taken by the Madras High Court in the case of (3) *Parry's Confectionary Limited v. Industrial Tribunal* (1974) 45 FJR 329 and (4) *Associated Cement Co. v. Labour Court*, 1976 (33) Indian Factories & Labour Reports 381. In our view, the report of the enquiry officer clearly shows that the charges against Deoraj were all independently established by the substantive evidence of the three witnesses examined on behalf of the appellant. The enquiry officer made a correct approach when he used the statement of Sitaram only for the purpose of finding corroboration. For the two reasons referred to hereinbefore, the tribunal was of the view that the statement of Sitaram could

not have been used even for the purpose of corroboration. The objection that this statement had not been read over and explained to Deoraj appears to be hyper-technical. There was a joint enquiry conducted in presence of both. Both appear to be knowing Hindi and obviously the statement that was made by Sitaram in presence of Deoraj was in Hindi. Moreover, the minutes recorded by the enquiry officer shows that the recorded statement itself was read over and explained in Hindi to Sitaram. Obviously that was done in presence of the co-delinquent Deoraj and mere omission to record that it was read over and explained to Deoraj also makes no difference whatsoever. The other objection is that Deoraj was not asked to cross-examine Sitaram on the statements made by him. Here again, we find that the statement made by Sitaram at the enquiry is substantially the same as he is alleged to have made to the foreman on the date of the incident and as spoken of by the foreman B. N. Roy. There is no dispute that Deoraj was called upon to cross examine B. N. Roy on the evidence given by him in his examination-in chief including his statement as to what Sitaram had told him about the matter on the date of the incident. Such an offer, however, was declined and as a matter of fact Deoraj had declined to cross-examine any of the witnesses examined on behalf of the appellant. He had not even adduced any evidence to support his own defence. Moreover at no point of time during the enquiry or even thereafter did he make any grievance that Sitaram should have been offered for cross-examination. In such circumstance, in our view, mere failure on the part of the enquiry officer to call upon Deoraj to cross-examine Sitaram had not resulted in any material prejudice. More so, in view of the subsequent events which unmistakably go to show that the appellant offered to hold a fresh enquiry giving all such opportunities as the respondent No. 3, Deoraj may demand. Such opportunity was expressly declined. Therefore, we are unable to sustain the objection that there was any violation of the principles of natural justice by the enquiry officer or that there was no fair enquiry on the charges levelled against the said respondent. It is clear, therefore, that there is an error apparent on the face of the award in so far as the tribunal held that use of the statement of Sitaram by the enquiry officer for the purpose of corroborating the substantive evidence, which by itself proves the charges constitutes infringement of the principles of natural justice. The first point raised by Mr. Ganguli, therefore, succeeds.

15. Though on the conclusion as aforesaid the second point raised by Mr. Ganguli becomes redundant, yet it must be said that the said point too is now concluded in favour of the appellant by the decision of the Supreme Court. It is now well settled that if in the view of the tribunal the domestic enquiry must fail, then in that event it would still be open to the employer to substantiate the charges on which action has been taken by him to the satisfaction of the tribunal on

independent evidence led before it. It has been strongly contended by Mr. Manna that though the appellant had such a right, yet they were not entitled to any second opportunity to adduce such evidence when they failed to do so at the initial stage. According to Mr. Ganguli on the other hand, the validity of the domestic enquiry should be decided as a preliminary issue and once the tribunal finds that such enquiry must fail, that the employer should be given an opportunity to adduce independent evidence to substantiate the charges before the tribunal. This procedure should have been followed in the present case. Contention of Mr. Ganguli on the point is well supported by the decision of the Supreme Court in the case of (5) *Cooper Engineering Ltd. v. P. P. Mundhi*, AIR 1975 SC 1900, where the Supreme Court reviewed all the previous decisions on the point including the decision in the case of *Motipur Sugar Factory* relied on by Mr. Manna. On such review it has been held that in the event of a dispute being raised as to the validity of the domestic enquiry the tribunal is first to consider that issue as a preliminary issue for deciding whether the enquiry must fail on some valid ground or not and only when according to the tribunal such an enquiry would fail that the management should be given an opportunity to bring home the charges to the satisfaction of the tribunal by adducing independent evidence in support thereof. Such being the legal position, Mr. Ganguli is fully justified in objecting to the procedure adopted by the tribunal in the present case. The tribunal never decided the issue as to whether the domestic enquiry could be sustained in law or not as a preliminary issue though the same is a matter of controversy between the parties. On the other hand the tribunal proceeded on the view that when the appellant had not adduced independent evidence even at the initial stage in support of the alternative defence on merits it must be held that the charges had not been proved at all. Though the view so taken by the tribunal has found favour with the learned trial judge in our view it is contrary to the above decision of the Supreme Court in the case of *Cooper Engineering Limited*. Such being the position had we upheld the finding of the tribunal that there had been a failure of the domestic enquiry, we would have remanded the proceeding to the tribunal for re-adjudication on merits after giving the appellant an opportunity to adduce independent evidence in support of their charges against the delinquent Deoraj, respondent No. 3.

16. In the result, the appeal succeeds. The judgment and order of the learned trial judge are set aside. The writ petition of the appellant succeeds and the Rule is made absolute. The award passed by the tribunal is set aside. Parties are directed to bear their costs throughout.

Let an appropriate writ do issue accordingly.

Chakrabarti, J. : I agree.

P. R.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee

Decision : June 8, 1976

Maliram Joshi Petitioner

Versus

Ranjilal Sharma Respondent*

Code of Civil Procedure sec. 151.—Jurisdiction of Court of Small Causes to pass mandatory temporary injunction.

Petitioner applied under sec. 41 of the Presidency Small Causes Court Act in the court of small causes calcutta for recovery of possession of a room against the opposite party. Petitioner's case is that the O. P. was a licensee and he had revoked the licence. O.P. failed to vacate the room and the petitioner disconnected the supply of electricity to the said room. O. P. then filed an application under sec. 151 of the Code of Civil Procedure and chap. XXXVII Rules 1 and 2 of the Presidency Small Causes Court Manual for mandatory injunction directing the petitioner to restore the supply of electricity. Petitioner contended that the 'O. P. had no right or locus standi to enforce in the Small Cause Court his right to use electricity and also contended that the Small Cause Court had no jurisdiction to enter any such application, Judge Court of Small Causes, Calcutta passed an order of mandatory injunction commanding the petitioner to restore the electric supply to the O. P. immediately. Petitioner then obtained the present rule challenging the said order.

HELD: In the instant case the order of temporary injunction was not covered by order 39 of the Code of Civil Procedure but was issued in the exercise of inherent powers of the court of small causes.

The inherent jurisdiction of the court of small causes in proceeding under sec. 151 of the code is confined to granting temporary injunction in matters of procedure and does not extend to substantive rights of the parties. The question whether an occupier or a tenant is entitled to enjoy electricity in the premises is not a matter of procedure only but it pertains to question of substantive rights. Chapter XXXVII of Rules and Practice does not embody any rule corresponding to Rule 2 of order 39 of the Code. Therefore the court of small causes in the exercise of its inherent powers cannot affect questions of substantive right to possession and enjoyment of immovable property. The Court of Small Causes had exceeded its jurisdiction by passing the mandatory order for restoration of electricity to the room in occupation of the O. P.

The Rule is made absolute and the order complained of is set aside. The application for injunction for restoration of electric supply be dismissed as not maintainable.

Cases referred to :—

- (1) *Rameshwar Dubey v. Jogendralal Saha and others*, AIR 1968 Cal 234=55 CWN 474

*Civil Rule No. 3460 of 1975.

(2) *Hukumchand v. Kamalanand*, ILR (1906) 33 Cal 972

(3) *Monoharlal v. Seth Hiralal*, AIR 1962 SC 527

(4) *Padam Singh v. State of Uttar Pradesh*, AIR 1961 SC 218

<i>Biswajit Ghose and Debasish Mitra</i>	...	...	<i>for petitioner</i>
<i>G. L. Arora and Motilal Agarwal</i>	...	...	<i>for opposite party</i>

The judgment of the Court was as follows :—

The present petitioner has applied under Section 41 of the Presidency Small Causes Court Act in the court of Small Causes, Calcutta for recovery of possession of a room in the third floor of premises No. 7 Burtalla Street, Calcutta from the opposite party. His case is that the said premises belong to a joint Hindu family governed by Mitakasha-sara school of Hindu Law of which he was the *Karta* and the manager. The opposite party has been alleged to be a near relation of the petitioner. It has been claimed that the opposite party was granted leave and license to use and occupy one room on the third floor of the said premises No. 7 Burtolla Street and that the said license had been revoked and/or withdrawn by a letter dated 11th February 1975. The defendant had failed to vacate the room. Hence the plaintiff has prayed for recovery of possession.

2. The opposite party in his written statement has denied the above allegations. He has *inter alia* stated that he is a tenant in respect of the said room under Mahanands Ramju Rameswar Joshi at a rent of Rs. 10- per month payable according to Hindi calender. The opposite party's case is that the petitioner is not entitled to recover possession.

3. The opposite party filed an application purported to be under Section 151 of the Code of Civil Procedure and Chapter XXXVII Rules 1 and 2 of the Presidency Small Causes Court Manual praying for mandatory injunction directing the petitioner to restore the supply of electricity of one light and one fan to the disputed room which was disconnected on June 2, 1975. The petitioner opposed the said prayer for mandatory injunction made by the opposite party. The petitioner however, did not dispute that during the pendency of the above proceeding, he had disconnected supply of electricity to the disputed room. He claimed that the opposite party was a licensee and the said license had already been revoked. The use of the electricity by the opposite party was permissive and the said permission had been already withdrawn after due warning to the opposite party, who had been using electricity for the purpose of operating iron, heater etc. The petitioner contended that the opposite party had no right or locus standi to enforce in the Small Causes Court his right to use electricity. The jurisdiction of the Court to entertain the said application for mandatory injunction was also questioned.

4. The learned Judge, 3rd Bench, Court of Small Causes Calcutta by his order dated 1st September, 1975 has passed an order of mandatory

injunction, commanding the petitioner to restore the electric supply to the opposite party with immediate effect. The opposite party has been ordered to deposit in the trial Court a sum of Rs. 16/- per month commencing from September, 1975. The plaintiff has been given liberty to withdraw the amount, if so deposited irrespective of the result of the suit. Therefore, the petitioner obtained the present rule. Admittedly the opposite party had been enjoying electricity in the disputed room until the petitioner had disconnected the same. The only point in this rule is whether the court of Small Causes has any jurisdiction to pass mandatory temporary injunction for restoration of electric supply to the room in dispute.

5. Mr. Ghosh, learned Advocate for the petitioner has submitted that even according to the Court below the order of temporary injunction passed by it was not governed by the provisions of order 39 Rule 1 of the Code of Civil procedure or Chapter XXXVII of the Rules of Practice of the Court below. According to Mr. Ghosh the court in a proceeding under section 41 has no jurisdiction to pass mandatory temporary injunction for restoration of electric supply affecting substantive rights to an immovable property. In this connection, Mr. Ghosh relied upon the decisions in (1) *Ramashwar Dubey v. Jogendralal Saha and others*, AIR 1968 Calcutta 234, 53 CWN 474.

6. Mr. Aurora, who appeared on behalf of the opposite party on the other hand has contended that Section 151 of the Code of Civil Procedure has been made applicable to suits to be tried by the Court of Small Causes, Calcutta. A proceeding under section 41 of the Code of Civil Procedure is to be disposed of according to procedure applicable to such suits. Among other provisions, Section 151 of the court has been made applicable to Small Causes Court suits. Therefore, in the instant case the Court below did not exceed its jurisdiction by issuing mandatory temporary injunction in the exercise of its inherent jurisdiction.

7. In the instant case, the order of temporary injunction was not plainly covered by Rule 1 of order 39 but was issued in the exercise of the inherent powers of the court of Small Causes.

8. The Code of Civil procedure is not exhaustive. The Court has therefore, in cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act ex debito justitiae and to do that real and substantial justice for the administration of which alone it exists (Vide Mulla on Code of Civil Procedure, 13th Edition) Vol. I page 576. Also, see, (2) *Hukumchand v. Kamalanand* ILR (1906) 33 Calcutta 972. The Supreme Court in (3) *Monoharlal v. Seti Hiralal*, AIR 1962 Supreme Court 527, set at rest differences in judicial opinion on the question whether the Court could issue a temporary injunction under Section 151 when the case does not fall within the terms of either Rule 1

or Rule 2 of order 39. It is well-settled that inherent powers of the Court cannot be exercised when prohibited by the Code of Civil Procedure. Inherent powers are also not to be ordinarily exercised if the Code does not contain any specific provision which would meet the necessity. Further, inherent power is to be exercised only for ends of justice. The Supreme Court in (4) *Padam Singh v. State of Uttar Pradesh* AIR 1961 Supreme Court 218 held that an order appointing a Commissioner for seizing Account Books of the plaintiff was invalid because the said power under Section 151 was exercised with respect to a matter affecting the substantive rights of the plaintiff. It was observed that specific powers have to be conferred on the Courts for passing orders affecting substantive rights of parties, such powers can not come within the scope of inherent powers of the Court in matter of procedure which powers have source in the Court possessing all the essential powers to regulate its practice and procedure. Raghubar Dayal J. who delivered the majority opinion in (3) *Monohar Lal v. Seth Hiralal* (Supra) at page 533 of the reports quoted with approval of these observations. Chatterjee J. in (1) *Ramashwar Dubey v. Jogindra Lal Saha and others* AIR 1968 Calcutta 234 (Supra) followed these decisions regarding scope of inherent powers of the Court to grant injunction affecting substantive rights. Chatterjee J. in *Rameshwar Dubey v. Jogindra Lal Saha and others* AIR 1968 Calcutta 234 (Supra) held that an injunction can not be granted under Chapter XXXVI part 3 of the Rules framed by the High Court under Section 9 of the Presidency Small Causes Court Act or under the inherent powers of the Small Causes Court to restrain a person from functioning as a Councillor, Calcutta Corporation pending disposal of an election petition under the Calcutta Municipal Act, 1951. Chatterjee J. was of the view that Rule 1 of Chapter XXXVII part 3 empowers the Small Causes Court to grant injunction when (1) any property in dispute in a suit is in danger of being wasted, damaged or alienated by a party to the suit or wrongfully sold in execution of the decree and (2) when the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors. In the absence of any other prescribed rule, the Court of Small Causes cannot grant injunction in other circumstances, it was held that the Chief Judge had no power to grant temporary injunction to restrain an elected Councillor from assuming office. Chatterjee J. further held that a temporary injunction in the exercise of the Court's inherent power can be granted in a matter which does not affect substantive rights of a party, unlike Rules 1 and 2 of Order 39 which empower the Courts to grant injunction even in cases of substantive rights. Chatterjee J. further held that although Section 151 has been extended the Small Causes Court has no power to grant any injunction affecting substantive rights to any party in cases other than those which come under Chapter XXXVII.

9. These decisions are binding upon me. Therefore, I am to hold

that the inherent jurisdiction of the Court of Small Causes in proceeding under Section 151 is confined to granting temporary injunction in matters of procedure and does not extend to substantive rights of the parties. The question whether an occupier or the tenant is entitled to enjoy electricity in the premises in his occupation is not a matter of procedure only. But the same pertains to question of substantive rights. The opposite party has to establish that such rights to electricity invested in him and there is corresponding duty on the part of the petitioner to give uninterrupted electric supply to him. The question of this entitlement and corresponding obligation and content of the said right to get electric connection are all matters of substantive law. The Court below unless can form even a *prima facie* opinion that the opposite party has a right vested in him to enjoy electricity it cannot issue any mandatory temporary injunction directing restoration of electric supply. In case of a tenant perhaps a right to enjoy electricity may be a part of covenant of quiet possession. The Civil Court in an appropriate case may under Rule 2 of order 39 issue temporary injunction to restrain repetition or continuance of breach of such covenant of quiet possession between the landlord and the tenant. But Chapter XXXVII of Rules and Practice does not embody any rule corresponding to Rule 2 of order 39 and therefore, the Court of Small Causes in the exercise of its inherent powers cannot affect questions of substantive right to possession and enjoyment of immovable property.

10. Mr. Aurora appearing on behalf of the opposite party emphasised that the opposite party had been so long enjoying electricity in his room and the same was disconnected during the pendency of the proceeding under Section 41. But the said facts cannot empower the Court in a proceeding under Section 41 to pass interlocutory orders in excess of its powers.

11. For the aforesaid reason, I reluctantly come to the conclusion that the Court of Small Causes had exceeded its jurisdiction by passing mandatory order for restoration of electric connection to the rooms in occupation of the opposite party. This order, however, would be without prejudice, to the right of the opposite party to take recourse to any other proceeding according to law to get restoration of electric supply to his room. I express no opinion as to whether the opposite party is a tenant or a licensee and whether he is entitled to make any application in this connection before the learned Rent Controller or to file a separate suit.

12. I accordingly make the rule absolute and set aside the order complained of. The application for injunction for restoration of electric supply filed by the opposite party be dismissed as not maintainable but without prejudice to his right to take recourse to any other proceeding according to law. Let the proceeding under Section 41 be disposed of as quickly as possible. The records be sent down immediately.

P. R.

[CIVIL APPELLATE JURISDICTION]
Before Mr. Justice R. Bhattacharjee and Mr. Justice
Monoj Kumar Mukherjee

Decision : September 7, 1978

Smt. Gurdev Kaur & Anr. ... Appellant

Versus

Rash Behari Das ... Respondent*

Motor Vehicles Act, 1939—Secs. 110A, 110B, 110C, 110D, 110E, 95(1)(b)(i), 111A—Claim for compensation for injury—Non liability of Insurer, when accident does not occur in a public place—Appeals under sec. 110D—Cross objection, if maintainable—Basis of fixing amount of just compensation—Pecuniary loss and non pecuniary loss.

R. B. Das filed an application under sec. 110A of the Motor Vehicles Act, 1939 before the Motor Accident Claims Tribunal claiming Rs. 84000/- as compensation from the appellants the owner and the insurer of the offending vehicle. His case was that while he was inspecting his lorry a private bus belonging to the appellant No. 1 came over him at a terrific speed and without blowing any horn, as a result of which he got pressed between the bus and the lorry and sustained grievous injuries including multiple fractures and he had to remain bedridden for a continuous period of fourteen months and has become almost invalid. Tribunal held that the accident took place due to the rash and negligent driving of the bus and the owner was vicariously liable for the tortious act of her driver and must compensate the injured. It assessed the compensation at Rs. 33000/- Aggrieved by the Award the owner and the insurer preferred this joint appeal. The respondent filed a cross objection challenging the adequacy of the compensation.

Appellants contended that the accident did not occur in a public place and so in view of the provisions of sec. 95(1)(b)(i) of the Motor Vehicles Act, the insurer was not liable for any claim. Appellants also contended that the right to file cross objection is a sustaintive right and in absence of any provision in the Act expressly conferring such a right the cross objection is not maintainable. Appellants also challenged the quantum of compensation.

HELD : The evidence on record establishes that the accident took place on a public place, so the insurer was liable for the claim. The accident was due to the rashness and negligence of the driver of the bus, therefore the respondent is entitled to compensation for injuries sustained by him.

When a special statute merely provides that an appeal shall lie to the High Court, without prescribing the procedure to be followed in the

**Appeal from Original Order No. 546 of 1978 with C. O. T. 1651 of 1978*

conduct and career of such appeal, such an appellate jurisdiction has to be exercised in the same manner as the High Court exercises its appellate jurisdiction and the appeal so filed is to be regulated by the practice and procedure of the High Court. So an appeal filed under sec. 110D of the Motor Vehicles Act is to be disposed of just in the same manner as other appeals in the High Court. The cross objection filed by the respondent is maintainable.

In quantifying the compensation it has to be considered what would be the pecuniary sum which will make good to the injured, so far as money can do, the loss which he has suffered as the natural result of the injuries caused to him. Section 110B of the Act provides for determining the amount of compensation which appears to be just. The evidence adduced in this case and the condition of the respondent as observed by the Tribunal unmistakably prove that the respondent sustained grievous injuries for which he was confined to bed for fourteen months and due to the injuries sustained he has become permanently disabled and has been deprived of all prospects of gainful engagement in future. The expectancy of life of the respondent has been reduced. In view of all these facts the amount of Rs. 48000/- would be the just compensation.

Cases referred to :—

- (1) *National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd.* AIR 1963 SC 357
- (2) *Collector of Varanasi v. Gouri Shankar*, AIR 1968 SC 384
- (3) *Berham v. Gambling* (1941) 1 All ER 7
- (4) *Richards v. Highway Iron foundry (West Bromwich) Ltd.*, (1955) 3 All ER 205

<i>Biswajit Chowdhury</i>	...	...	...	for the Appellants
<i>Dilip Kumar Seth and Probhas Chandra Nag</i>	...	...	...	for the Respondent

The judgment of the Court was as follows :—

Mukherjee, J. : For personal injuries sustained in a motor accident, Sri Resh Behari Das, the respondent herein, filed an application under Section 110A of the Motor Vehicles Act, 1939 (hereinafter referred to as the Act) before the Motor Accident Claims Tribunal for Calcutta and 24 Paraganas (hereinafter referred to as the Tribunal) claiming a sum of Rs. 84,000/- as compensation from the owner and insurer of the offending vehicle, the appellant Nos. 1 & 2 respectively in this appeal.

2. The claimant's case was that on April 12, 1971 at about 3 p.m. while he was inspecting his lorry No. WBQ 3048, which was being repaired in the Automobile welding Shop of Dulal Das situated near the junction of Diamond Harbour Road and Government Quarters thoroughfare, a passenger Bus bearing No. WBS 2837 then plying on Route No. 3B came from north along Diamond Harbour Road and while taking turn towards the Government Quarters Road in terrific speed and without

blowing any horn, came over him as a result of which he got pressed between the bus and the lorry and sustained greivous injuries including multiple fractures. Due to the injuries sustained he had to remain bed-ridden for a continuous period of fourteen months and he became almost invalid.

3. The claim was resisted by both the appellants by filing two separate written statements though on similar grounds. It was not denied that the Bus belonging to the appellant No. 1 knocked down the respondent. They, however, denied that the accident occurred due to any rashness negligence or fault on the part of the driver and contended that the respondent was solely responsible for the said accident. It was, further, contended that the respondent suffered some injuries of minor nature and in any case he was not entitled to any compensation.

4. In support of his claim the respondent, besides examining himself, examined six other witnesses and exhibited some documents but no evidence was adduced on behalf of the appellants.

5. On consideration of the materials on record, the learned Tribunal by his award dated June 9, 1977 held that the accident took place due to the rash and negligent driving of the offending vehicle and as such the owner was vicariously liable for the tortious act of her driver and must compensate the injured for the same. Considering the nature of the injuries sustained and the loss in earning capacity occasioned thereby the Tribunal assessed the compensation at Rs. 33,000/-. The Tribunal directed the Insurer to pay the compensation by July 11, 1977 failing which the amount would carry simple interest at 6% per annum from that date until realisation. An all inclusive cost of Rs. 200/- was also allowed. Aggrieved by the said award of the Tribunal, the Owner and the insurer of the offending vehicle preferred this joint appeal. Having come to know about filing of the appeal, the respondent, before service of notice of the appeal, entered appearance and filed a cross-objection challenging the adequacy of the compensation awarded by the Tribunal.

6. Mr. Chowdhury, the learned Advocate appearing for the appellants firstly contended that the accident having not arisen out of the use of the vehicle in a public place the insurer was not liable for any claim arising out of the accident in view of the provisions of Section 95 (1)(b)(i) of the Act. In support of his contention Mr. Chowdhury referred to the evidence of some witnesses, from which Mr. Chowdhury's inference was that the accident took place inside the Government Housing Estate situated on the West of Diamond Harbour Road and not on any public place. Mr. Chowdhury submitted that the explanation to section 95(1) also could not come in aid of the respondent as the bus, while entering into the Government Housing Estate, which is a private place, met with the accident. According to Mr. Chowdhury, the accident did not take place nor can it be deemed to have been caused by or to have arisen out of the

use of the bus in a public place. Mr. Sett, the learned Advocate appearing for the respondent on the other hand contended that in view of the pleading such a plea was not available to the insurer.

7. In paragraph 5 of the written statement the Insurer gave its version as to how the accident took place and it reads as follows :—

“On 12th April, 1971 at about 2 p.m. while the said bus No. 2837 was entering the Housing Estate Terminus of Route No. 3D upon crossing the Diamond Harbour Road a person who was working under a lorry by which the said bus passed, suddenly came out from under the lorry and negligently dashed against the bus at its rear side and as a result he sustained some injuries of minor nature.”

8. According to the Insurer, therefore, the accident took place on the road leading to the terminus of passenger transport vehicles. Such terminus and the road leading to the same must necessarily be a public place and in view of such pleading the contention of Mr. Chowdhury cannot be entertained, far less accepted. Even if it was assumed that such contention was available to the Insurer at this appellate stage, the evidence on record does not lead to the inference sought to be drawn by Mr. Chowdhury therefrom. The consistent evidence of the witnesses who spoke of having seen the accident, namely, PW 3 Jhinku Jadav, PW 6 Ranjit Das, son of the respondent and that of PW 7, the respondent himself was, that when the bus coming from the north along the Diamond Harbour Road, suddenly turned towards west it met with the accident. Much emphasis was laid by Mr. Chowdhury on the evidence of PW 6 when he said that the bus came from north and entered the Estate (Government Housing Estate) towards west and dashed Rashbehari Babu, to argue that such statement clearly showed that the accident took place inside the Estate. We are, however, unable to agree with Mr. Chowdhury reading a single sentence of his evidence taken out of its context. This witness has categorically stated that the accident took place on Diamond Harbour Road near Government Housing Estate.

9. Reading the evidence of the witnesses together with the pleading of the parties, we have no hesitation in concluding that when the bus was taking a turn towards west from the Diamond Harbour Road the accident took place. The evidence on record clearly establishes that the accident took place on a public place and we find no merit in the contention of Mr. Chowdhury in this regard.

10. Though Mr. Chowdhury on behalf of the owner has challenged the finding of the Tribunal that the accident took place due to rash and negligent driving of the offending vehicle we have gone through the evidence and we have no hesitation in concluding that the finding of the Tribunal on this score is fully justified. The victim in his evidence stated that while he was standing by the side of his lorry, which was being repaired at the garage of Dulal Mistri facing east, the bus came in a rash manner without blowing horn from the north and when entering into

Government Housing Estate, he was pressed between his lorry and the bus. In cross-examination this witness stated that he stood on garage land when he was pressed and at that time the bus faced west and the lorry faced east, P. W. 3 Thinku Jadav, who was the driver of the lorry belonging to the respondent and who was present at the time of accident also corroborated PW 7 when he said that the bus came from north and entered the Estate towards west when the accident took place. In cross-examination he denied the suggestion that the injured was below the lorry and suddenly came out before the moving bus. The other witness, namely, Gopal Chandra Bag, who was repairing the lorry at the material time, stated that he was below the lorry and was welding the same. On hearing a hue and cry he came out and saw Rash Behari Babu pressed between the lorry under repair and the bus No. WBS 2837. All these evidence clearly show that the bus suddenly turned towards the west speedily and pressed the victim against the lorry and the accident took place due to rash and negligent driving of the bus. Though the defence of the appellants was that the victim, who was working under the lorry, suddenly came out and negligently dashed against the bus at its rear side, no evidence was led on behalf of the owner, nor the evidence on record remotely supports such defence.

11. Consequent upon our finding that the accident took place on a public place due to the rashness and negligence of the driver of the offending vehicle the respondent is entitled to compensation for injuries sustained by him. It is to be now seen whether the quantum of compensation as awarded by the Tribunal in favour of the respondent is just in the facts and circumstances of the case. Before we proceed to delve into this matter we have to answer the question raised by Mr. Chowdhury about the maintainability of the cross-objection.

12. According to Mr. Chowdhury, the right to file cross-objection is a substantive right and in absence of any provision in the Act expressly conferring such a right the cross-objection is not maintainable. Mr. Chowdhury contended that the provisions of Section 110 to 110F of the Act formed a self contained Code and the provisions of the Civil Procedure Code, except to the extent as specifically provided for therein, were not applicable. Since the provisions of Order 41 of the Code of Civil Procedure were not made applicable, there could not be any cross-objection under Order 41, Rule 22 of the Code, argued Mr. Chowdhury.

13. To appreciate the contention of Mr. Chowdhury it would be profitable to refer to the relevant provisions of the Act itself. Section 110 of the Act empowers the State Government to constitute Tribunals for specified areas for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of or bodily injury to persons or damages to any property of a third party arising out of the

use of motor vehicles. Sections 110A to 110C and 110E describe the manner in which applications are to be filed and dealt with and also specify the scope and extent of the powers of the Tribunal. Section 110C(2) specifically provides that the Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath, and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and for such other purposes as may be prescribed. It also provides that the Tribunal shall be deemed to be a Civil Court for certain provisions of the Criminal Procedure Code. Section 110D of the Act provides for appeal against the award of the Tribunal and entitles a person aggrieved by an award, to prefer an appeal to the High Court subject to the limitations mentioned therein.

14. For the purpose of carrying into effect the provisions of Section 110 to 110E of the Act, the State Government has been empowered under Section 111A to make rules and clause (d) thereof entitles the State Government to make rules relating to the form and the manner in which and fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal. In exercise of the powers conferred by Section 111A the Government of West Bengal formed Rules entitled "Motor accidents Claim Tribunal Rules" which find place in Chapter IX of the Bengal Motor Vehicles Rules, 1940. All the rules in the said Chapter except Rule 239 relate to proceedings before the Tribunal. Rule 239 prescribes that an appeal against the award of Claims Tribunal shall be preferred in the form of a memorandum stating concisely the grounds on which the appeal is to be preferred and that the memorandum shall be accompanied by a copy of the judgment and the award appealed against.

15. It would thus appear that except providing for a right to prefer an appeal to the High Court under Section 110D, the Act does not expressly lay down the procedure to be followed by the High Court in dealing with the appeals filed before it nor do the rules contain any provision as to such procedure. The question, therefore, arises whether in absence of any express provision in the Act a cross-objection is maintainable.

16. In the case of (1) *National Sewing Thread Co. Ltd v. James Chadwick & Bros Ltd.*, reported in AIR 1963 SC Page 357, while dealing with the question as to whether a Letters Patent appeal would lie to a Division Bench of the High Court from an appellate judgment of a single judge under the Trade Marks Act, the Supreme Court observed as follows :—

"The Trade Marks Act does not provide or lay down any procedure for the future conduct or career of that appeal in the High Court, indeed section 77 of the Act provides that the High Court, can

if it likes make rules in the matter. Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established then that appeal must be regulated by the practice and procedure of that Court. This rule was very succinctly stated by Viscount Haldane L. C. in *National Telephone Co., Ltd. v. Postmaster General* in these terms :—

“When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches.”

After referring to two other cases the Court further observed :—

“Section 76 of the Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by section 76 it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his Judgment becomes subject to appeal under clause 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act.”

17. The above principle was reaffirmed by the Supreme Court in the case of (2) *Collector of Varanasi v. Gauri Shankar*, reported in AIR 1968 SC 384, with these words :—

“We were informed that neither the Act nor the rules framed thereunder prescribe any special procedure for the disposal of appeals under Section 19(1)(f) referring to the (Defence of India Act). Appeals under that provision have to be disposed of just in the same manner as other appeals to the High Court. Obviously, after the appeal had reached the High Court it had to be determined according to the rules of practice and procedure of that Court. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established then that appeal must be regulated by the practice and procedure of that Court.”

18. The decisions of the Supreme Court referred to above, therefore, expressly lay down that when a special statute merely provides that an appeal shall lie to the High Court, without prescribing the procedure to be followed in the conduct and career of such appeal, such an appellate jurisdiction has to be exercised in the same manner as the High Court exercises its general appellate jurisdiction and the appeal so filed is to be

regulated by the practice and procedure of the High Court. Though the decisions of the Supreme Court were in respect of other statutes, in our view, the law enunciated by the Supreme Court is one of general application and the same would equally apply to an appeal under Section 110D of the Act. The inescapable conclusion that follows therefrom is that the cross-objection filed by the respondent is maintainable.

19. Mr. Chowdhury contended that the compensation of Rs. 20,000/- awarded by the Tribunal to the respondent for loss of earning capacity is liable to be set aside as no claim for compensation was made on that head. Mr. Chowdhury, further, submitted that in absence of any basis for fixing the amount at Rs. 20,000/- the award of the Tribunal to the above extent is also liable to be set aside. Mr. Sett on the other hand, urged that considering the fact that the injured has become invalid, the compensation awarded is inadequate.

20. In an action for personal injuries the theoretical basis has all along been to compensate the injured by such sum of money which will put the person injured in the same position as he would have been if he had not sustained the injuries for which he is now getting the compensation. In other words, in quantifying the compensation it has to be considered what would be the pecuniary sum which will make good to the injured, so far as money can do, the loss which he has suffered as the natural result of the injuries caused to him. In practice of course it is extremely difficult to assess the pecuniary loss because many factors are involved some of which, will necessarily be, matters of speculation and conjecture. Though as a general principle an injured is entitled to have a certain sum of money calculated in a manner so as to make good to him the financial loss which he has suffered and will probably suffer as a result of the wrong done to him, it cannot be reasonably foreseen what he has, in fact, suffered or would suffer in future as many unforeseen factors may intervene. If he had not been injured he might have had the prospect of earning a continuing income for many years but there can also be many uncertainties to such prospect of income and there is always the possibility that he might have died or suffered from some other incapacity at any time or he might as well have met with another accident. While the loss which he has suffered between the date of the accident and the date of the trial may be ascertained with some precision, the prospective loss cannot be. The Court however has to assess such compensation as a lump sum once for all not only in respect of loss suffered till the date of the trial but also in respect of prospective loss. Such being the position the compensation that is to be assessed can never be a perfect compensation and the Court shall always try to make out a case for just and fair compensation. It is for this difficulties that Section 110B of the Act provides for determining the amount of compensation which appears to be just and not perfect. It necessarily follows that in so doing the Court

must take a reasonable view of the case and give what it considers, taking all the facts and circumstances into considerations, a just compensation. Then again, in calculating what would be the just compensation, the different forms of damages caused to the victim have to be looked into. All the different forms of damages which are to be taken into consideration may not be present in a given case but there are certain heads of damages which are to be commonly found in claims arising out of personal injuries. Such different heads of claims can again profitably be divided into two categories, those which are capable of being calculated in terms of money commonly known as pecuniary loss as the same can be assessed arithmetically and those which cannot be so assessed, which are commonly known as non-pecuniary loss.

21. In the category of pecuniary loss the first item of claim would necessarily be the expenses caused by the injuries. The victim will be entitled to recover expenses reasonably incurred for medical treatment, nursing etc. Another item of claim which would fall under this category of pecuniary loss would be the loss in respect of the earning or profits suffered by the victim as a result of the injuries till the date of the trial. While in the case of a person employed on fixed wages and salary it is easier to calculate such loss, in the case of a professional or business man whose earnings fluctuate, the Court has to estimate the loss and award compensation accordingly. Similarly, the prospective loss of earning or profit has also to be assessed.

22. As regards non-pecuniary loss, the first item which the victim can legitimately claim as compensation for, is the damages in respect of the pain and suffering which he has undergone upto the date of the trial and which he is likely to undergo even thereafter. The next item of claim under this category of non-pecuniary loss, comes the claim for the loss of amenities of life. To raise a claim under this item the victim may successfully contend that apart from pain and suffering and apart from any material loss, his enjoyment for the years he will live, has been impaired by the accident. Another important category of claim under this head is the loss of expectation of life. Considering the nature of injuries sustained, the victim in a given case, can claim that by such injuries his expectation of life has been shortened and for deprivation of happiness in the years he might have otherwise lived, he is entitled to claim compensation.

23. To sum up therefore the claim for compensation for personal injuries sustained in an accident can be generally characterised in the following manner :—

(A) Pecuniary Loss

1. Expenses caused by the injuries.
2. Loss of earning or profits

(a) from the date of accident till date of trial.

(b) prospective loss.

(B) Non-pecuniary Loss.

1. pain and suffering.

2. loss of the amenities of life.

3. loss of expectation of life.

24. Let us now, therefore, consider the facts of the instant case keeping in view the above criteria. From the evidence of the victim Rash Behari Das we get that due to the accident he was bed ridden for fourteen months and at the time of his deposition he was not in a position to move or lift his right hand. Besides he can not speak freely though prior to the accident he had a good physique and had no physical trouble. It, further, appears that the Presiding Officer of the Tribunal noted, while recording the deposition of the victim, that he did not appear to be physically fit even then. Dr. N.R. Baidya (P.W.2), who was the family physician of the respondent, stated in his deposition that on 12/4/71 he attended to Rash Behari Das and found the patient suffering from shock and injuries over right shoulder joint right clavicle and chest walls. He consulted Dr. S.C. Nath, Dr. D. Roy Chowdhury and Dr. Guha Mazumdar. Under their advice Sri Das was X-rayed and number of fractures were detected. According to Dr. Baidya, Sri Das was suffering from malignant hypertension, uncontrolled diabetes mellitus, congestive cardiac failure with dyspnoea and pain. According to this Doctor, Sri Das was an invalid person and all his subsequent maladies were due to injuries received in the accident. Dr. Himadri Kumar Deb (P.W.1) an Orthopaedic Surgeon, stated that he first examined Rash Behari Das on 17.4.71 and found multiple fractures of ribs of both sides, fracture of neck of right humerus and fracture of right clavicle. His opinion at that time was that the patient may develop lung complications and there was possibility of restriction of movement of chest walls. On being shown the X-ray photographs taken on 16.4.71 he stated that there were fractures of 5th, 6th and 7th ribs on the right side with displacement as also fractures of 4th, 5th, 6th and 7th ribs on the left side. From the X-ray plate he found that there was fracture of humerus. He, further, stated that the patient sustained partial disablement at that time. In cross-examination this witness stated that there was possibility of permanent disablement although most of the infirmities would go. According to this witness though the fractures were treated, the shoulder joint was stiff and the right clavicle fracture was still tender indicating healing was not complete. He explained that his opinion was with reference to the time of his examination. Dr. Sailendra Kumar Saha (PW 5) who deposed before the Tribunal on 13.5.77 stated that on 3.5.77 he examined Rash Behari Das and found:

"1. Mal United fracture of the junction of the middle and lateral 3rd of the right clavicle.

2. Mal United fracture of the upper end of the right humerus with induration and tenderness of the arm muscles.

3. Mal united fractures of the right 5th, 6th and 7th ribs and left 4th, 5th, 6th, 7th and 8th ribs with pain on compression of chest and diminished air entry to the left chest.

4. Swelling and tenderness of the articular margins of the bones of the right shoulder and acromio-clavicular joints with stiffness, pain and limitation of movements of the arm suggesting chronic sprains."

25. He gave opinion that the life expectancy of the patient was reduced and that the injuries that were sustained by the patient could have been caused on being pressed between two vehicles. According to this Doctor, the patient sustained permanent disablement.

26. The evidence adduced in this case and the condition of the respondent as observed by the Tribunal unmistakably prove that the respondent sustained grievous injuries for which he was confined to bed for fourteen months and due to the injuries sustained he has become permanently disabled and has been deprived of all prospects of gainful engagement in future. The materials on record also prove that the expectancy of life of the patient has been reduced. Keeping in view the injuries sustained and the physical condition of the respondent, we have to ascertain what would be the just compensation.

27. Against the first item of claim under the head "pecuniary loss", namely, expenses incurred for the injuries, the respondent claimed a sum of Rs. 4,000/- and a sum of Rs. 3,000/- was awarded by the Tribunal. Ranjit Kumar Das, son of the applicant stated that a sum of Rs. 7,500/- to Rs. 8,000/- had already been spent for medicine and special diet. This witness was examined after a period of five years from the date of filing of the application and his estimate of expenses included the money spent after the date of such filing. In support of his contention that the sum of Rs. 7,500/- to Rs. 8,000/- was spent he produced some cash memos and receipts. Though this part of his evidence was not challenged in any way in cross-examination we are unable to accept his claim in full as all necessary documents in support of such claim have not been produced. However considering the fact that the patient was examined by five eminent doctors and the documents produced in support of prolonged treatment, we are of the view that the respondent is entitled to the entire sum claimed. We, therefore, assess the amount of compensation for medical expenses Rs. 4,000/-.

28. •On the other head of pecuniary loss, namely, loss of earning or profits a total sum of Rs. 25,000/- was claimed and against such claim a sum of Rs. 20,000/- was awarded as loss of earning capacity. Mr. Chowdhury strongly urged that loss of earning capacity and loss of earning or

profits are two distinct and different heads of claim and since the respondent did not claim any amount for loss of earning capacity the Tribunal erred in awarding any sum, far less a sum of Rs. 20,000/- under that head. In our view, there is no substance in the contention of Mr. Chowdhury. In the facts of the instant case it is clear that the Tribunal equated the loss of earning in the business as loss of earning capacity and in that view of the matter the loss of earning capacity as referred to by the Tribunal must be considered as loss of earning in the business. The reference of Mr. Chowdhury to the Workmen's Compensation Act and the decisions of our High Court under the said Act, have no bearing what so ever as under the said Act, which is confined to "Workmen", as defined thereunder, earning capacity has a different connotation.

29. For the purpose of assessing the compensation under this head namely, loss of earning or profits we have to treat the same under two sub-heads, namely, (1) from the date of accident till the date of trial and (2) prospective loss. It is in evidence that the respondent was carrying on business in building materials under the name and style of "Sri Ram Krishna Building Stores" and for the purpose of the business he owned a lorry by which he was supplying materials. In fact, it was this lorry whose repairing work he was attending to when the accident took place. In support of his claim that he was running such business the trade licence was exhibited. The khata which was maintained in respect of the business was also exhibited. In the application for compensation the respondent showed his income as Rs. 1,000/- per month while in his deposition he has stated that his monthly income was Rs. 2,000/-. In view however of his categorical statement that he did not pay any income tax we are unable to accept the contention of the applicant that he earned a sum Rs. 1,000/- to Rs. 2,000/- per month as stated by him but, considering the nature of the business and the documents exhibited, there cannot be any manner of doubt that he had atleast an income of Rs. 250/- per month from his business. From the date of the accident in April, 1971 till the date of trial in 1977, that is, during a period of six and half years his income from business would have been to the tune of Rs. 19,500/-. We also get in evidence that he sold down his business to meet the expenses of the accident for a sum of Rs. 10,000/-. Excluding that amount of Rs. 10,000/- the respondent is thus entitled to a sum of Rs. 9,500/- as lost of earning or profits from the date of accident till the date of trial.

30. As regards prospective loss we can reasonably hold that inspite of the injuries sustained and permanent disability caused thereby he will live upto the age of 65 years and considering the fact that his age at the date of trial was 59 years he is expected to live for another 6 years from that date and during all these period he could have earned the modest sum

of Rs 200/- per month and on this basis the applicant is entitled to a sum of Rs. 14,400/- as compensation for prospective loss.

31. Next comes the question of assessing non-pecuniary loss. For pain and suffering, the first item of claim under this head, the Tribunal has awarded a sum of Rs. 2,500/-. Mr. Chowdhury did not raise any grievance about the quantum of compensation awarded under this item and it appears to us that the amount awarded is just and reasonable. Similarly, for loss of amenities of life, which in the instant case, has rightly been described by the Tribunal as loss due to permanent disablement, a sum of Rs. 7,500/- has been awarded and Mr. Chowdhury has not challenged the quantum. The amount awarded under this item of claim also appears to be reasonable and we uphold the same.

32. We now come to the last item of claim which is for loss of expectation of life. The learned Tribunal, has not awarded any compensation for this loss though Rs. 15,000/- was claimed. As we have already discussed, Dr. Sailendra Kumar Saha (PW5) has categorically stated that due to the injuries sustained the life expectancy of the injured was reduced. This part of the evidence was not in any way challenged and therefore the Tribunal erred in not awarding any compensation under this head. A person whose expectation of life has been reduced by reason of the injuries is entitled to compensation for such reduction. The claim of compensation under this head cannot be equated with the loss of future pecuniary prospects but has to be considered keeping in view the fact that the injured has to be compensated for the deprivation of the prospective happiness in the years he might have lived, but for the accident. The basis for quantification of such compensation was laid down by Viscount Simons LT in the case of (3) *Benham v. Gambling* reported in (1941)1 All England Law Reports Page 7 with these words : "I would further lay it down that in assessing damages for this purpose (that is, the loss of expectation of life), the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring in happiness. Test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial loss or gains during the period of which the victim has been deprived of. The damages are in respect of loss of life, not of loss of future pecuniary prospects."

33. The above dictum of Viscount Simons LT was approved and applied in the case of (4) *Richards v. Highway Ironfounders (West Bromwich) Ltd.*, reported in (1955)3 All England Law Reports, page 205 while deciding an appeal arising out of a claim for personal injuries.

34. Viewing the facts of the instant case, in the light of the above principle, we get in evidence that the victim was aged about 52

years at the time he met with the accident and was the father of an able bodied son aged about 29 years. The victim was also running an well established business with a lorry of his own. Under such circumstances it can be safely presumed from these objective materials, that injured, but for the accident, might expect to have enjoyed a predominantly happy life in the years of which he has been deprived. Considering these facts and circumstances, we are inclined to award him a sum of Rs. 10,000/- as against Rs. 15,000/- claimed by him.

35. The total sum of compensation receivable by the respondent therefore comes to Rs. 48,000/- under the following heads : -

(A) Pecuniary Loss

- | | |
|---|---------------|
| 1. Expenses caused by the injuries. | Rs. 4,000-00 |
| 2. Loss of earning or profits : | |
| (a) from the date of accident till the date of trial. | Rs. 9,500-00 |
| (b) prospective loss. | Rs. 14,400-00 |

(B) Non-pecuniary Loss

- | | |
|-----------------------------------|---------------|
| 1. Pain and suffering. | Rs. 2,500-00 |
| 2. Loss of the amenities of life. | Rs. 7,500-00 |
| 3. Loss of expectation of life. | Rs. 10,000-00 |

Rs. 47,900-00

Rounded to Rs. 48,000/-.

36. Mr. Chowdhury lastly argued that the award of simple interest at 6% per annum by the Tribunal on the entire sum awarded was arbitrary and illegal. According to Mr. Chowdhury, interest could have been awarded only on the special damages, that is, the damages incurred till the date of the trial and not on general damages, namely, the prospective compensation awarded from the date of the trial. The contention of Mr. Chowdhury cannot be sustained as the interest that has been awarded in this case was to be calculated from the date by which the Tribunal directed payment of the compensation. We do not find anything illegal or unjust in awarding such interest and in fact, Section 110 CC specifically provides for payment of such interest.

37. In view of our foregoing discussions, we dismiss the appeal and allow the cross-objection in part. The respondent will get a total sum of Rs. 48,000/- as compensation, which shall be paid by the Insurer. In case of failure on the part of the Insurer to pay the money by November 30, 1978 the same will carry an interest at the rate of 6% per annum from 1.12.78 till realisation. The respondent will also be entitled to 30 G.Ms. as consolidated costs of the appeal and the cross-objection to be paid by the Insurer.

Bhattacharjee, J. : I agree.

N. C. S.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Arun Kumar Janah and Mr. Justice Sudhamoy Basu

Decision : April 7, 1978

Salil Kumar Mukherjee and others ... Appellants*Versus***Hindusthan Steel Ltd. and others** ... Respondents*

And

Dhrubendra Nath Basu and others ... Appellants*Versus***Hindusthan Steel Ltd. and others** ... Respondents*

Specific Relief Act, 1963, sec. 34, Requirements under—Suits for declaration, when maintainable—Whether employees of a company which is registered under the Companies Act, 1956 and whose entire shareholding belongs to the Government of India, are government employees.

Plaintiffs are employees of C.S.O. a unit under respondent H. S. Ltd.

They filed the two suits for a declaration that they are entitled to get seniority from the date of their joining service under H. S. Ltd. Plaintiffs in T. S. Suit No. 748 of 1972 joined Durgapur unit of H. S. Ltd. and plaintiffs in T. S. No. 758 of 1972 joined Rourkela unit of H. S. Ltd. Sales Office of H. S. Ltd. invited applications from assistants for parallel transfer initially to be posted at C. S. O. at Calcutta. Plaintiffs applied for parallel transfer and were selected to be posted at C. S. O. Calcutta. Certain terms were imposed on them, viz., that the employees would be treated as on transfer for all purposes but their eligibility for their seniority in the C. S. O. would be considered only with reference to the date they joined C.S.O. Plaintiffs contended that their seniority for purpose of promotion should be calculated from the date of their original appointment under H. S. Ltd. at any of its units and not from the date of their joining C. S. O. on transfer. The Trial Court found that the dispute was an industrial dispute within the meaning of sec. 2(k) of the Industrial Disputes Act, 1947. It also held that the suits were barred under the provisions of the Specific Relief Act, 1963. Trial court dismissed the suits as not maintainable. Plaintiffs preferred appeals against the judgment and contended that in the present case the ordinary law of master and servant would not apply in view of the nature of the appointment of the plaintiffs, that the plaintiffs were industrial workers and had legal character as such and the court could make a declaration under sec. 34 of the Specific Relief Act, 1963.

HELD : *Before a plaintiff is entitled to get a decree under sec. 34 of the Specific Relief Act, 1963, he must be personally entitled to a legal character or to any right to any property. In the present case no declaratory decree has been prayed for in respect of any property. The declaration*

**Appeals from Original Decrees Nos. 356 and 357 of 1975.*

sought for is that the seniority of the plaintiffs should be counted from a particular date. Such a declaration can not be said to be a declaration as to a legal character of the plaintiffs. The right claimed here flows from contract and not from any legal character of the plaintiffs. If the right originates in or flows from a contract such right cannot form the Subject matter of a declaration under Section 34 of the Specific Relief Act. The legal character contemplated under sec. 34 must be attributed to the plaintiffs by law as distinguished from a contract. Plaintiffs in the present cases are employees of H. S Ltd. which is a Government of India undertaking and is a company registered under the Companies Act, 1956. Plaintiffs are not government servants nor are they servants of a corporation or a body set up under a particular statute. They are employees under a company although the entire share holding of that company belongs to the Government of India. Plaintiffs being employees of such a company are no better than employees under a private employer. Therefore no declaratory relief can be given to the plaintiffs, the Trial Court was right in holding that the suits were not maintainable.

Cases referred to :—

- (1) *Premier Automobiles Ltd. v. Kamalakar Santana Wadke and others*, AIR 1975 SC 2238
 - (2) *Executive Committee of U. P. State Warehousing Corporation v. Chandrakiran Tyagi*, AIR 1970 SC 1244
 - (3) *Heavy Engineering Majdoor Union v. State of Bihar and others*, AIR 1970 SC 22
 - (4) *Subodh Ranjan Ghose v. Sindhri Fertiliser and Chemical Ltd.*, AIR 1957 Patna 10
 - (5) *Sukdev Singh v. Bhagatram*, AIR 1975 SC 1331
 - (6) *Executive Committee of Vaish Degree College, Samli v. Lakshmi Narayan*, AIR 1976 SC 888
 - (7) *United Commercial Bank and another v. V. I. T. Vyas*, 77 (1) CLJ 498
 - (8) *Indian Airlines v. Sukdev Rai* AIR 1971 SC 1828
- S. B. Bhunia and Madhusudan Banerjee .. for the Appellants in both appeals*
Noni Coomar Chakraborty, P. N. Choudhury, ...
Subhendu Banerjee and Mihir Chakraborty ... for the Respondents in
FA 356/75 and for respondents
No. 1 in FA 357/75

The judgment of the Court was as follows :—

Janah, J. : These two appeals arise out of two suits filed by two sets of plaintiffs against the Hindusthan Steel Ltd. The plaintiffs are the employees of the Central Sales Organisation, a unit under Hindusthan Steel Ltd. They filed the two suits for a declaration that they are entitled to get seniority from the date of their joining service under the Hindusthan Steel Ltd. The plaintiffs in Title Suit No. 748 of 1972 joined the

Durgapur Unit of the Hindusthan Steel Ltd. and the plaintiffs in Title Suit No. 758 of 1972 joined the Rourkela Steel Plant and Coal Washery Project under the Hindusthan Steel Ltd. They alleged that their seniority should be counted from the date on which they joined their service in the respective units under the Hindusthan Steel Ltd. and not from the date on which they joined on transfer, the Central Sales Organisation, which is also another unit under the Hindusthan Steel Ltd. The plaintiffs also prayed for a permanent injunction restraining their employer the Hindusthan Steel Ltd. from ignoring their seniority and also for a mandatory injunction directing the Hindusthan Steel Ltd. to give effect to the said seniority of the plaintiffs.

2. The plaintiffs in the two suits made similar allegations in their respective plaints. The allegations made by the plaintiffs are as follows : Hindusthan Steel Ltd. is a Government of India undertaking having its Head Office at Ranchi and it consists of Steel Plants at Durgapur, Bhilai and Rourkela with one Alloy Steel Plant, one fertilizer plant and Coal Washery. It has also its office, namely, Central Sales Organisation at Calcutta. It was alleged that each plant has one General Manager at its Head and he is the Supreme Administrative Authority. According to the rules of the Hindusthan Steel Ltd. the employees are inter changeable or transferable. The plaintiffs in one case were appointed at the Durgapur unit on different dates at a certain scale of pay and the plaintiffs in the other suit were appointed at the Rourkela Steel Plant on different dates at a certain scale of pay. The plaintiffs worked satisfactorily in their respective places of appointment and their seniority was recorded in the respective units from time to time. By a circular dated 29th December, 1969, under the signature of P.C. Koar for Personnel Manager, Durgapur Plant, intimation was given that the administrative officer, Hindusthan Steel Ltd., Sales Office, invited applications from Assistants (Typists), Assistants (S/T), for parallel transfer initially to be posted at the Central Sales Organisation at Calcutta, but subsequently they may be posted at the branch office of the Organisation. The plaintiffs and other employees applied for parallel transfer to the Central Sales Organisation in Calcutta. About 28 employees including the plaintiffs were selected from the Durgapur Steel Plant. The Personnel Manager, Durgapur Steel Plant unilaterally and arbitrarily imposed certain illegal and oppressive terms of transfer, which were not contemplated before, at the time of issuing the circular. The said terms are that the employees shall be treated as on transfer for all purposes but their eligibility for their seniority in the Sales Office will be considered only with reference to the date they join the Sales Office. It was alleged that the plaintiffs were forced to submit to this illegal and malafide position. It was further alleged that the plaintiffs believed that the defendant would eventually relax the above mentioned arbitrary condition and their seniority would be counted from the date of their

initial appointment under the Hindusthan Steel Ltd. The defendant however stuck to the above mentioned arbitrary and illegal condition and hence the plaintiffs were compelled to file the suit.

3. The plaintiffs in Title Suit No. 748 of 1972 who were initially appointed in the Durgapur Steel Plant were given to understand before joining the Central Sales Organisation at Calcutta that the eligibility for the purpose of promotion would be considered with reference to their date of joining the Calcutta office. The plaintiffs in Title Suit No. 758 of 1972 were not however given to understand the aforesaid fact expressly before they joined the Central Sales Organisation at Calcutta. In both the suits the plaintiffs however made the same grievance and contended that their seniority for the purpose of promotion should be calculated from the date of their original appointment under the Hindusthan Steel Ltd. at any one of its units, and not from the date of their joining the Central Sales Organisation on transfer.

4. The defence of the Hindusthan Steel Ltd. in both the suits is similar. It was contended that the suits were not maintainable as framed. It was contended that the seniority of an employee at the Central Sales Organisation was to be counted from the date of his joining the said office and not from any earlier date. It was contended that the different units of Hindusthan Steel Ltd. are independent units and each unit maintains its own seniority list. There is no common seniority list of all the employees under the Hindusthan Steel Ltd. The defendant alleged that the suits were barred under the provisions of Specific Relief Act and the plaintiffs were not entitled to any declaration or injunction as prayed for.

5. Both the suits were tried together and were disposed of by a common judgment. The trial court found that the dispute involved in the present case was an Industrial dispute within the meaning of section 2(k) of the Industrial Disputes Act, 1947. It further held that the suits were barred under the provisions of the Specific Relief Act, 1963. The trial court, therefore, dismissed the suits as not maintainable although on merits the trial court found in favour of the plaintiffs.

6. Against the decision of the trial court the plaintiffs in the two suits have preferred these two appeals,

7. Mr. Bhunia, learned Advocate, appearing on behalf of the appellants has elaborately argued the appeals contending that the view taken by the trial court is erroneous. He has contended that in the present case the ordinary law of master and servant will not be applicable in view of the nature of the appointment of the plaintiffs. According to him, Section 34 of the Specific Relief Act, 1963, comes to his aid and he is entitled to get the declaration prayed for. He contended further that Section 14 which precludes the court from granting a decree for specific performance in cases of certain contracts would have no

application in the present case. His argument is that his clients are industrial workers within the meaning of Industrial Disputes Act, 1947 and, therefore, they have a legal character as such, in respect of which the court is competent to make a declaration. He has referred to Annexure 'A' to the plaint in Title Suit No. 748 of 1972 which is a letter of appointment dated 16th January, 1963, from the Deputy General Manager (Personnel) Durgapur Steel Plant to one of the plaintiffs. That letter in clear terms states that the employees will be treated as industrial workers and leave, holiday etc. will be guided by standing orders. Relying on this letter learned advocate has contended that his clients are industrial employees.

8. Mr. Chakraborty, learned Advocate, appearing on behalf of the respondent, has, on the other hand, argued that if the plaintiffs are workmen within the meaning of Industrial Disputes Act and if the present dispute is an industrial dispute the plaintiffs are free to agitate their grievance before the Industrial Tribunal set up under the Industrial Disputes Act, but they cannot come to the Civil Court to agitate their grievance.

9. The plaintiffs in Title Suit No. 748 of 1972 have stated in paragraph 9 of the plaint that they along with other transferred employees were permanent employees under the Hindusthan Steel Ltd. and their conditions of service such as salary, seniority etc. could not be affected to their prejudice by their transfer to any other department of the organisation. On transfer from one permanent post to another they would be entitled to hold substantively the permanent post to which they were transferred and this would bring along with them the seniority which they had in the post from which they were transferred. A reference was made to a letter dated September 24, 1969, addressed to the General Secretary, Association of Hindusthan Steel Employees by Mr. Ramakrishnan, the Administrative Officer. It was alleged in the plaint that the administration subsequently succumbed to the pressure and threat of the Association and had to change the procedure regarding the seniority and accepted the Association's terms that seniority of the transferred employees of other units to the Central Sales Organisation at Calcutta, would be determined from the date of their joining the Calcutta office. It is clear from this averment in the plaint that the plaintiffs made a grievance regarding their loss of seniority subsequent to their joining the Central Sales Organisation which is a unit under the Hindusthan Steel Ltd. According to the plaintiffs they were industrial workers and as such they fulfilled a legal character in respect of which the civil court is competent to grant a declaration. On behalf of the respondents Mr. Chakraborty contended that the defendants do not controvert the plaintiffs' claim that they are industrial workers and, therefore, there is no occasion for granting such a declaration. According to Mr. Chakraborty, the dispute in the present case is between employer and employees namely, the Hindusthan Steel and

some of its workmen namely, the plaintiffs. He accordingly contended that the dispute is in connection with the terms of the employment of the plaintiffs at the Central Sales Office, and, therefore, such a dispute is an industrial dispute and it is to be adjudicated by a competent tribunal contemplated under Chapter II of the Industrial Disputes Act. Mr. Chakraborty further contended that the provisions of section 9 of the Code of Civil Procedure is impliedly barred in view of the provisions of the Industrial Disputes Act. In this connection he referred to paragraph 5 of the Ext. D and contended that pursuant to some discussion held on 20th January, 1972, with the representative of the Association of the Hindusthan Steel Ltd. Employees and the Director (Commercial), it was settled that the plant employees who are transferred during 1969 in response to open advertisement issued by the Sales Office and those who joined on compassionate grounds will be allowed seniority as above (seniority on transfer from plant units etc) on the basis of requirement of the office will be reckoned from the date of such employees joining. Association confirms that the employees concerned are also agreeable to this arrangement. Mr. Chakraborty contended that Exhibit D is in substance a memorandum of settlement as defined in section 2(p) of the Industrial Disputes Act. According to him whether Exhibit D is in compliance with the conditions or terms as defined in section 2(p) cannot be considered by a civil court. Mr. Bhunia, on the other hand, contended that Exhibit D is not strictly in accordance with section 2(p) of the Industrial Disputes Act and therefore jurisdiction of the civil court is not barred. He relied on the decision of the Supreme Court in the case of (1) *Premier Automobiles Ltd. v. Kamalaker Santana Wadke and others*, AIR 1975 SC 2238. In that case the Supreme Court while discussing the jurisdiction of the civil court to entertain a suit of a civil nature has observed that even if a statute has expressly provided for a particular form in which a remedy could be had, a suit in a civil court will always lie to question the order of a tribunal created by a statute, even if its order is expressly or by necessary implication made final, if the said tribunal abuses its power or does not Act under the Act, but in violation of its provisions. In the present case the appellants did not approach a competent tribunal under the Industrial Disputes Act, they are neither challenging the order of the tribunal on the ground that the tribunal has abused its power or has not acted in accordance with provisions of the Act. The appellants have come straight to a civil court to ask for reliefs which the tribunal set up under the Industrial Disputes Act can grant them. The observations of the Supreme Court relied on by Mr. Bhunia in support of his contention does not, therefore, in the facts of the present case, help him.

10. The plaintiffs in the present suit have prayed in prayer (a) of the plaint "that the plaintiffs may be awarded a decree for declaration

that they are entitled to get seniority from the date of joining their respective post in the Durgapur Unit of the defendant company and not from the date of their joining office at the Central Sales Organisation at Calcutta and the imposition of terms to the contrary are illegal, ultra vires, mala fide arbitrary and oppressive and is not binding on them." Section 34 of the Specific Relief Act, 1963, empowers a court to grant a declaration of status or right in the discretion of the court. Before a plaintiff is entitled to get a declaratory decree he must be personally entitled to a legal character or to any right to any property. In the present case no declaratory decree has been prayed for in respect of any property. The declaration sought for is that the seniority of the plaintiffs should be counted from a particular date. Such a declaration cannot be said to be a declaration as to a legal character of the plaintiffs. The right claimed here flows from contract and not from any legal character of the plaintiffs. If the right originates in or flows from a contract such right cannot form the subject matter of a declaration under section 34 of the Specific Relief Act. The legal character contemplated under section 34 must be attributed to the plaintiffs by law as distinguished from a contract. It is well established that a contract of personal service cannot be specifically enforced except in certain limited cases. These exceptions are :

- (i) where a public servant who has been dismissed in contravention of Article 311 of the Constitution ;
- (ii) re-instatement of dismissed employee under Industrial law or by Labour or Industrial tribunal ; and
- (iii) a statutory body when it has acted in breach of a mandatory obligation under the statute.

Except in the cases mentioned above the remedy for wrongful dismissal or for breach of conditions of service would be a suit for damages. In (2) *Executive Committee of U. P. State Warehousing Corporation v. Chandrakiran Tyagi*, AIR 1970 SC 1244, the Supreme Court while dealing with this aspect of the case reviewed a number of English decisions as well as of Supreme Court and held :

"The law relating to master and servant is clear. A contract for personal service will not be enforced by an order of specific performance nor will it be open for a servant to refuse to accept the repudiation of contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract. This is the normal rule.....But when a statutory status is given to an employee and there has been a violation of the provisions of the statute while terminating the service of such an employee, the latter will be eligible to get the relief of a declaration that the order is null and void and he continues to be in service, as it will not then be a mere case of a master terminating the services of a servant."

The plaintiffs in the present cases are employees of the Hindusthan Steel Ltd. which is a Government of India undertaking and is a company registered under the Indian Companies Act, 1956. The plaintiffs are not government servants nor are they servants of a corporation or a body set up under a particular statute. They are employees under a company although the entire share holding of that company belongs to the Government of India. In (3) *Heavy Engineering Majdoor Union v. State of Bihar and others*, AIR 1970 SC 82, the Supreme Court has pointed out :

“The question whether a corporation is an agent of a State must depend on the facts of the each case. Where a Statute setting up a corporation so provides, such a corporation can easily be identified as an agent of the State In the absence of a statutory provision, however, a commercial corporation acting on its own behalf, even though it is controlled wholly or partially by a government department will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the Government..... Such an inference that the corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions.”

The Hindusthan Steel Ltd. can by no stretch of imagination be said to have been set up for performing any governmental function. It is a purely commercial venture carried on by a company registered under the companies Act, 1956, although the entire share-holding belongs to the Central Government. An incorporated company has a separate existence and in law it is a juristic person. This new personality emerges from the incorporation of the company. The plaintiffs being employees under such a company are no better than employees under a private employer. Vide (4) *Subodh Ranjan Ghosh v. Sindhri Fertiliser and Chemical Ltd.*, AIR 1957 Patna 10 ; (5) *Sukdeo Singh v. Bhagatram*, AIR 1975 SC 1331 ; (6) *Executive Committee of Vaish Degree College, Samli v. Lakshmi Narayan*, AIR 1976 SC 888 ; (7) *United Commercial Bank and another v. V. J. T. Vyas*, 77(1) CLJ 498 and (8) *Indian Airlines v. Sukdeo Rai*, AIR 1971 SC 1828. Several other authorities were also cited before us on behalf of the respondents on the point. But it is not necessary for us to enumerate all these decisions. It follows from what have been stated above that the relationship between the parties in the present case is that of pure master and servant.

11. Realising the difficulty created by the decisions mentioned above Mr. Bhunia, learned Advocate for the appellants submitted that in the present case there is an element of public employment in the very nature

of the employment of the appellants under the respondents and, therefore, this Court should "pierce the veil of corporate entity and examine the reality beneath." In support of this branch of his submission learned Advocate for the appellants referred to certain passages occurring at page 216 of the Principles of Modern Company Law, 3rd Edition, by Gower. There the author has expressed the opinion that :

"Judicial inroads into the corporate entity principles are few compared with the examples of its application. But inroads there have been it would be idle to pretend that they can be reduced to any consistent principles, but the following tentative conclusion may, perhaps, be drawn."

Thereafter the author proceeds to enumerate the different types of cases where the courts have ignored the corporate entity in order to determine the real state of things. The instances cited by the author mostly relate to different matters such as where the corporate personality is being blatantly used as a cloak for fraud and improper conduct, or where the courts have ignored corporate entity in the interests of the third parties. Mr. Bhunia also drew our attention to Pennington's Company Law, 3rd Edition, page 45 where the author discusses the exception to the rule of separate legal personality and states as follows :

"Four inroads have been made by the law on the principles of separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislature has gone so far that in certain circumstances taxation can be heavier if companies are employed by the tax payer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes."

At page 50 of the said book the author discusses the instances where the corporate entity has been ignored and the veil has been lifted to ascertain the reality beneath. These are instances of evasion of obligation imposed by law. Mr. Bhunia also relied upon a passage occurring in Contracts of Employment by Dix, 5th Edition page 157 where the author discusses about equitable remedies and instances where such remedies have been made available by courts. The passage relied on by Mr. Bhunia is as follows :

"In (9) *Hill v. C. A. Persons and Co. Ltd.* an injunction was granted to an employee in a very unusual circumstances. As a result of pressure brought upon the employer by a Trade Union which was attempting to establish a closed shop. Mr. Hill was given one month's notice by his employer to terminate his employment. He held a senior position with the company which,

said the majority of court of appeal, entitled him to reasonable notice of at least 6 months'. The length of notice was of crucial significance for if the employee had been given six months' notice by the time it expired the provisions of the new repealed Industrial Relations Act, 1971 would have been in force. The court, by a majority, granted Mr. Hill the injunction restraining his employer from acting on dismissal."

In the same book the author has expressed the view that the courts have recently shown a far greater inclination than in the past to grant judicial declarations and it may be that in the future the declaration will play an important role in employment law. Mr. Bhunia has accordingly argued that the modern tendency being to extend the scope of declaratory relief, the court below was wrong in restricting it. But this argument is not available to Mr. Bhunia because of the decisions already mentioned, where it has been held that no declaratory relief can be given to the plaintiff in cases similar to the present one. It must, therefore, be held that the trial court was right in holding that the suit was not maintainable.

These appeals, are, therefore, dismissed. But there will be no order as to costs.

Basu, J. : I agree.

P. R.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Chittatosh Mookerjee

Decision : June 3, 1977

Narayan Fakirsa Javre Petitioner
Versus

Union of India and others Respondents*

**Railway Service Commission, Recruitment for employment through—
Laches of Railway administration in forwarding application of candidate within time.**

Being selected by R. S. C., petitioner on 19.7.65 was appointed as a supervisor at the scale of Rs. 205-380. On a leave vacancy of the foreman for two months he was temporarily promoted as foreman from October 1, 1971 to November 30, 1971 at his previous scale of Rs. 205-380. Subsequently he was again on January 18, 1973 temporarily promoted as a foreman at the scale of Rs. 250-380. On February 10, 1974 R. S. C. published in a newspaper Employment Notice for filling up inter alia the post of foreman, the last date for submission of the application to R. S. C. was March 22, 1974. Petitioner on February 22, 1974 submitted an application addressed to the controller of stores through

**Civil Rule No. 4782 (w) of 1974.*

proper channel for appointment to the post of Foreman. The Deputy controller of stores on the same date i.e., February 22, 1974 forwarded Petitioner's application to the Controller of Stores." On March 23, 1974 controller forwarded the application to the Chief Personnel Officer S. E. Rly for onward transmission to R. S. C. which received the application on April 10, 1974 i. e., after March 22, 1974 which was the last date for submission of application. In consequence the application was not considered by R. S. C. which formed a panel and recommended respondent No. 5 who had secured the first position, to the general Manager, S. E. Rly. Petitioner filed a writ petition alleging that the respondents had acted mala fide. arbitrarily and without any sense of responsibility in not transmitting the application of the petitioner before the closing date causing serious prejudice to the petitioner.

HELD : *In this case, as early as February 22, 1974 the Deputy controller forwarded petitioner's application to the controller of Stores. Respondents have not offered any explanation why till March 23, 1974 the controller did not forward to the Chief Personnel Officer the petitioner's said application for onward transmission to R.S.C. In this case plainly the respondents were at fault by not promptly forwarding the petitioner's application. It should be held that because of conduct on part of the Railway administration, the petitioner was deprived of the opportunity of appearing in the test/interview before R.S.C. and the R.S.C. could not consider the petitioner's claim for recruitment to the post of Foreman. Rly. administration by their own laches had deprived petitioner of an opportunity of making application in time to R.S.C. In the circumstances, the Rule is made absolute, and a writ of 'Mandamus issued commanding respondents to forbear from giving effect to the panel formed for filling up the post of Foreman.*

Cases referred to :—

- (1) *Krishna Chander Nayer v. The chairman, Central Tractor Organisation and Others*, AIR 1962 SC 602
- (2) *State of Andhra Pradesh v. T. Krishna Rao and Others*, 1971 (1) SCR 453

Asok Kumar Ganguly	...	for petitioner
S. K. Roy Chowdhury	...	for respondents

The judgment of the Court was as follows :—

On 19th July, 1965 after being selected by the Railway Service Commission the petitioner was appointed as a Supervisor Clothing Factory under the Deputy Controller of Stores, South Eastern Railway, Kharagpore in the scale of Rs. 205-380/- (A.S). The permanent incumbent of the post of Foreman, Clothing Factory, Kharagpore in the scale of Rs. 450-575/- (A.S.) was granted leave for the period 1st October, 1971 to 30th November, 1971. The petitioner was temporarily promoted as Foreman as a local stop-gap measure by down-grading the post of Foreman to lower grade of Rs. 250-380/- (A.S.) as personal to him. Again on 18th

January, 1973 the District Controller of Stores, South Eastern Railway, Kharagpore had temporarily promoted the petitioner purely as a stop-gap measure as Foreman Clothing Factory, South Eastern Railway, Kharagpore for looking after the work of the Foreman. The petitioner was drawing pay at the scale of Rs. 250-380/- (A.S.).

2. The petitioner's aforesaid promotion being temporary and by way of stop-gap measure consequent on the transfer of the incumbent of the post of Foreman to another Railway, the petitioner thereby did not acquire any right for future promotion or confirmation in the post of Foreman. Further, the respondents have pointed out that the petitioner's scale of pay as a Supervisor was Rs. 205-280/- (A.S.) which was four grades below the approved scale for the post of Foreman i.e., Rs. 450-575/- (A.S.). The post of Foreman was also to be filled up not by promotion but by direct recruitment. In fact, on 10th February, 1974 the Railway Service Commission had published in a daily newspaper Employment Notice No. 1/74 for filling up a number of posts including the post of Foreman, Clothing Factory, Kharagpore in the scale of Rs. 450-575/- (A.S.). The petitioner in paragraph 5 of his writ petition has set out an extract from Category 8/20 S.E. 141 OM 1 containing the terms and conditions for direct recruitment of Foreman, Clothing Factory, Kharagpore. The last date for submission of the application to the Railway Service Commission was 22nd March, 1974. The petitioner was already in government service. Therefore, Instruction No. 9 annexed to the application form applied in his case and the petitioner was bound to apply through proper channel. The petitioner did not submit a second application direct to the Railway Service Commission for the post of Foreman, Clothing Factory, Kharagpore. I shall hereinafter consider the effect of the said non-submission of any application direct to the Railway Service Commission by the petitioner.

3. On 22nd February, 1974 the petitioner had submitted an application addressed to the Controller of Stores Garden Reach through proper channel for appointment to the post of Foreman, Clothing Factory, Kharagpore. The Deputy Controller, of Stores, Kharagpore by letter No. 1362K dated 22nd February, 1974 had forwarded the petitioner's said application to the Controller of Stores, Garden Reach. On 23rd March, 1974 the Controller of Stores Garden Reach by his letter No. 5/58/A/19/374 had forwarded the petitioner's said application to the Chief Personnel Officer, South Eastern Railway for onward transmission to the Secretary, Railway Service Commission. Consequently, the petitioner's application for appointment as Foreman, Clothing Factory, Kharagpore was received by the Railway Service Commission on 10th April, 1974 i.e., after 22nd March, 1974 which was the last date for submission of application. The respondents in their affidavit-in-opposition have not disputed the aforesaid facts asserted by the petitioner in paragraph 7 of his writ

petition. The Railway Service Commission did not accede to the prayer of the petitioner for permission to appear in the examination conducted by the Railway Service Commission for filling up the post of Foreman which was fixed on 15th July, 1974. The petitioner had made reported representations without any success.

4. The Railway Service Commission had formed a panel for the post of Foreman, Clothing Factory, Kharagpore and had recommended one Lawrance Albert, the respondent No. 5, who had secured the first position, to the General Manager, South Eastern Railway. On 26th July, 1974 the said panel was published.

5. On 9th August, 1974 the petitioner obtained the present Rule. An interim order in terms of prayer (e) of the writ petition was granted initially for a period of six weeks. The petitioner applied for extension of interim order. The interim order was extended till the disposal of the said application. Subsequently, the Court directed the Rule and the interim application to be heard together.

6. The petitioner has fully established that because of the inordinate delay on the part of the respondents in forwarding his application to the Railway Service Commission his application did not reach the Commission in time and his candidature for the post of Foreman, Clothing Factory, Kharagpore was not at all considered by the Railway Service Commission. The petitioner's application was forwarded by the Deputy Controller of Stores as early as 22nd February, 1974. The respondents have not attempted to explain why till 23rd March, 1974 the Controller of Stores did not forward the petitioner's said application and had allowed the last date for submission of application to expire. His application was received in the office of the Railway Service Commission only on 10th of April, 1974.

7. The petitioner in paragraphs 8, 9 and 11 of his writ petition has stated that the respondents had acted malafide, arbitrarily and without any sense of responsibility in not transmitting the application of the petitioner before the closing date causing serious prejudice to the petitioner.

8. The petitioner has not given particulars of such malafide on the part of the respondents. It has not been even suggested that there was any basis for inferring that the respondents had any motive for withholding the petitioner's application. The petitioner has not alleged any malafide against Railway Service Commission which had formed the Panel and had recommended the name of the respondent No. 5 for the post of foreman, Clothing Factory, Kharagpore. The petitioner's application was admittedly received in the office of the Railway Service Commission after the last date. Therefore, the Railway Service Commission had acted in terms of the employment notice in question by not considering the petitioner's application.

9. But the Railway Service Commission was merely the recommending body advising the Railway Administration in the matter of recruitment in the post of Foreman, Clothing Factory, Kharagpore. The Railway

Administration was the Appointing Authority. Therefore, in this case if the Railway Administration by illegally and improperly delaying the submission of the petitioner's application had deprived him of the opportunity of being considered by the Railway Service Commission, appropriate writs ought to be issued against the Railway Administration.

10. The petitioner who was a government servant was bound to make his application in terms of Instruction No. 9 annexed to the employment notice. If he had failed to apply through proper channel, he was not eligible to be admitted to the test/interview. The instructions contained in the employment notice did not make it obligatory for the petitioner as a departmental candidate to send a second application direct to the Commission. The Instruction No. 9 merely provided :—

“If they apprehend unavoidable delay in their applications submitted through proper channel reaching the Commission before the closing date, they may submit their applications on the prescribed form to the Commission before the closing date, simultaneously bringing this fact to the notice of their employers.”

The instruction further made it clear that the second application if sent directly would be considered only provisional and a government servant sending such application would not be admitted to a written test/interview except on production of a no objection certificate from his employers.

11. The respondents have not disclosed that there was any basis for apprehension that an application for appointment sent through proper channel more than a month before the closing date was likely to be delayed. It does not behove the Railway Administration to take up the plea that the petitioner should have realised that delays in an administrative office were neither uncommon nor unusual or that for some reason or other matter might escape attention with the result that unintended delays take place in the office. In all fairness the respondents can be permitted to cover up from their own laches and negligence in the matter of processing the petitioner's application by taking such a plea of unavoidable delay. In this case, as early as 22nd February, 1974 the Deputy Controller, of Stores, Kharagpore had forwarded the petitioner's application to the Controller of Stores, Garden Reach. The respondents have not offered any explanation why till 23rd March, 1974 the Controller of Stores did not forward to the Chief Personnel Officer the petitioner's said application for onward transmission to the Railway Service Commission. In this case, plainly the respondents were at fault by not promptly forwarding the petitioner's application and cannot lay the blame at the door of the petitioner on the ground that he had not “chased the matter” or did not choose to send an advance copy direct to the Railway Service Commission. Even if no oblique motive is found on the part of the respondents in withholding the petitioner's application till the last date for submission of the application

to the Commission had expired, it should be held that because of conduct on the part of the Railway Administration, the petitioner was deprived of the opportunity of appearing in the test/interview before the Railway Service Commission and the Commission could not consider the petitioner's claim for recruitment to the post of Foreman, Clothing Factory, Kharagpore. It is true that the Railway Service Commission had acted in terms of the employment notice and did not act illegally or improperly. But the Railway Administration by their own laches had deprived the petitioner an opportunity of making application in time to the Railway Service Commission.

12. The learned advocate for the petitioner in support of his submission that the impugned acts of the Railway Administration amount to denial of equal opportunity of employment guaranteed under Article 16(1) has relied upon the decision in (1) *Krishna Chander Nayer v. The Chairman, Central Tractor Organisation and others* AIR 1962 SC 602. In the said case the Supreme Court held that arbitrary imposition of ban against employment of a person whose service was previously terminated under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949 amounted to contravention of Article 16(1). In this connection, Sinha CJ. in his judgment had observed :—

“The fundamental right guaranteed by the Constitution was not only to make an application for a post under the Government but the further right to be considered on merits for the post for which an application had been made.”

In the present case, although the petitioner could not claim any right to be appointed for the post of Foreman, he could justly contend that he should have been given an opportunity to be considered by the Railway Service Commission. He was deprived of such opportunity by reason of the Railway Administration withholding without any just cause his application till the expiry of the last date.

13. The decision of the Supreme Court in (2) *State of Andhra Pradesh v. T. Ramkrishna Rao and others* 1971(1) SCR 453 which was cited by Mr. Roychowdhury is clearly distinguishable on facts. In the said case the Andhra Pradesh State Public Service Commission had invited applications for direct recruitment to the post of District Munsif and respondents in the said case had applied for the said posts. The relevant rule under which applications had been invited was subsequently pronounced as invalid by the High Court. Thereafter, the Governor of the State had amended Rule 5 and the Public Service Commission had invited fresh applications. The Commission proposed to conduct examination for the purpose of filling up vacancies in the post of District Munsifs. The Supreme Court held that the Rule 5 having been struck down, the only way the Commission could prepare a list for appointment was under the amended Rule

5. That could be done by calling for fresh applications and holding an examination under the amended Rule. In the circumstances, there was no question of any breach of Article 16. Firstly, because there was no valid application before the Commission since the applications filed in the year 1968 were bad as they had been called and made under an invalid rule. Secondly, the respondents had not acquired any right by merely applying for posts either under rule or otherwise to be selected for the posts. The Commission was justified in treating the earlier applications as invalid on the ground that they were invited under an illegal rule. Thus, in the facts of the said case there was no question of breach of Article 16 nor of any violation of any right of the respondents as none was acquired by them. In the present case, the Commission had invited applications for filling up post of Foreman in accordance with valid rules. The petitioner as a government employee had duly made his application but the Railway Administration by not transmitting the petitioner's application before the due date, had deprived the petitioner an opportunity of being considered.

14. In the circumstances, I conclude that the Railway Administration should be commanded to forbear from giving effect to the panel formed for filling up the post of Foreman, Clothing Factory, Kharagpore with liberty to proceed in accordance with law for fresh recruitment to the said post.

15. I, accordingly, make this Rule absolute. Let a writ of Mandamus issue commanding the respondents to forbear from giving any effect or further effect to the panel published under Serial No. 229 dated 26.7. 1974 for filling up the post of Foreman, Clothing Factory, Kharagpore, and the respondents are also commanded to forbear from making any recruitment on the basis of the said panel. The respondents, however, would be at liberty to take fresh steps in accordance with law for recruitment to the post of Foreman, Clothing Factory, Kharagpore.

16. There will be no order as to costs.

17. No order is necessary on the application dated 13th September, 1974 and the same is disposed of.

18. Let the operation of this order remain stayed for a period of four weeks from this day, as prayed for.

P. R.

[CIVIL APPELLATE JURISDICTION]

*Before Mr. Justice Anil Kumar Sen and Mr. Justice**B. C. Chakrabarti*

Decision : January 25, 1978

Sm. Sachibala Roy ... Appellant*Versus***The State of West Bengal** ... Respondent*

Land Acquisition Act (1 of 1894), secs. 4(1), 5A, 6, 17 (4) and 18—
What are essential requirements for the Notification under sec. 4(1) of the
Act to be competent and effective.—In case there are two Notifications
under sec. 4, whether the earlier one is superseded by the latter.—Basis
of assessment for compensation.

On May 25, 1956, respondent issued a preliminary Notification under s. 4 of the Land Acquisition Act, 1894 specifying the general route to be taken for the survey within the boundary of the area stated therein. On August 20, 1964, respondent issued a fresh Notification under s. 4 and s. 17(4) of the Act, notifying that the lands specified in Sch. A and Sch. B annexed thereto were likely to be needed for public purpose. This Notification called for objections under s. 5A of the Act to the proposed acquisition of lands other than waste and arable lands. A declaration under s. 6 followed the Notification whereby a total area of 1.16 acres in four different plots belonging to the appellant was acquired. Appellant lodged a claim of compensation at the rate of about Rs. 600000 per acre. The collector made the assessment at the market value prevailing on the date of the preliminary Notification viz. May 25, 1956 and awarded her compensation at the rate of Rs. 2310 per acre. Appellant asked for a reference under s. 18 of the Act, claiming that the compensation should have been determined on the basis of the market value prevailing on August 10, 1964, the date of the second Notification and claiming compensation at Rs. 185000 per acre. District Judge held that lands acquired should be valued on the basis of the market value on the date of preliminary Notification dated May 25, 1956. After consideration of evidence, the District Judge held that on an average the market value of those plots of land should be assessed at the rate of Rs. 5500 per acre for compensation and made the Award accordingly. Against the Award Appellant preferred the present appeal to the High Court.

HELD : *The preliminary Notification under s. 4 of the Land Acquisition Act 1894 did not specify the land which was likely to be needed for a public purpose. In order to be a competent and effective Notification under sub-§ (1) of s. 4 of the Act the land has to be specified with that amount of certainty as would enable the people to put forward their objections*

*Appeal from Original Decree No. 506 of 1973.

under s. 5A. On its face the preliminary Notification did not invite any objections under s. 5A and was intended for no other purpose than for exploring the area through a survey authorised thereby. Where the Government does not choose to explain the reason which persuaded it to issue a second Notification the court may be justified in inferring that it was intended to supersede the earlier by the latter. The preliminary Notification was not intended to be an effective Notification for the purpose of s. 4(1) nor was it acted upon. The second Notification is a combined Notification under s. 4(1) and s. 17(4) of the Act. Objections under s. 5A were ruled out under s. 17(4) in respect of waste and arable lands. Appellant is therefore, entitled to get compensation which should be determined with reference to the market value of the land prevailing on the date of the second Notification namely, August 10, 1964. The appeal is allowed, the award is set aside and the case is remanded for retrial.

Cases referred to :—

(1) *Jogendra Nath Chatterjee v. The State*, 75 CWN 737

(2) *Bhumnath Chatterjee v. The State*, in Civil Appeal No. 654 of 1966 disposed of on March 14, 1969.

Dipankar Gupta, Nirmal Kanti Bhattacharya, Sailen Datta and ...
Tarun Chatterjee ... for the Appellant
N. G. Das ... for the Respondent

The judgment of the Court was as follows :—

Sen, J. : This appeal is directed against the judgment and award dated November 8, 1971, passed by the Learned District Judge, Burdwan, in LA Case No. 58 of 1971. The claimant is the appellant.

2. On May 25, 1956, the respondent State issued a preliminary notification under section 4 of the Land Acquisition Act (hereinafter referred to as the said Act) the material part where-of recited "whereas it appears to the Governor that land in the District of Burdwan is likely to be needed for a public purpose, namely, for the development of industries in the Durgapur area notice is hereby given to all whom it may concern that in exercise of the powers conferred by section 4 of the Land Acquisition Act (1 of 1894) the Governor has authorised the engineers and their subordinates for the time being engaged on this undertaking to enter upon and survey the land and do all other acts required for the proper execution of their work as provided for in the said section." The notification then proceeded to specify the general route to be taken for the survey within the area bounded on the north by the District of Burdwan, east by a line suitably extending from 108 mile post of G. T. Road being a width of about 3 miles all along from the western boundary of thana Kanksa, south by the Damodar river in the District of Burdwan and west by the eastern boundary of thana Faridpur.

3. There is no dispute that notwithstanding the aforesaid notification under section 4, the respondent-State issued a fresh notification under section 4 and section 17(4) of the said Act, notifying that the lands specified in the two Schedules annexed to the notification, namely, Schedule A (waste and arable land) and Schedule B (other than waste and arable land) are likely to be needed for the public purpose of development of industries in Durgapur area. This notification called for objections under section 5A of the Act to the proposed acquisition of lands other than the waste and arable lands but such objections were ruled out in respect of the waste or arable lands in exercise of powers under section 17(4) of the Act.

4. A declaration under section 6 of the Act followed the aforesaid second notification under section 4 on August 20, 1964, and as a result thereof land measuring 1.16 acres in total appertaining to 4 different plots differently situated being plot Nos. 725, 710, 824 and 762 of Mouza Khantpukur, Police Station Kanksa, District Burdwan belonging to the claimant appellant was acquired. The claimant/appellant lodged a claim of compensation under section 9 of the Act claiming compensation for the land at Rs. 10,000/- per cottah which works out a rate of little over Rs. 6,00,000/- per acre. The collector, however, awarded her compensation calculated at the rate of Rs. 2,310/- per acre. In doing so undisputedly the collector made the assessment at the market value prevailing on the date of preliminary notification under section 4 of the Act, namely, May 25, 1956. The claimant/appellant asked for a reference under section 18 of the Act wherein it was claimed that the compensation should have been determined on the basis of the market value prevailing on the date of the second notification under section 4 of the Act, namely, August 10, 1964 and that she should have been given compensation at the rate of Rs. 1,85,000/- per acre. A reference to the court was made on the basis of the said claim and it appears that in court the claimant filed an application for amendment of her claim by enhancing the rate claimed from Rs. 1,85,000/- to Rs. 6,00,000/- per acre.

5. The claim of the claimant/appellant was contested by the respondent/State and the learned District Judge framed the following two issues in adjudicating the said claim.

"1. Whether the compensation should be assessed on the basis of the market value as it was on 25.5.56, that is, the date of preliminary notification or on the basis of the market value as it was on 10.8.64, that is, the date of second notification ?

2. What should be the amount of compensation ?"

6. So far as the first issue is concerned, the Learned Judge held against the claimant/appellant. Though strong reliance was placed on behalf of the claimant on an earlier decision of this court in the case of

(1) *Jogendra Nath Chatterji v. The State*, 75 CWN 737, the Learned Judge took the view that the said decision is distinguishable as unlike the facts of that case in the present case in the preliminary notification dated May 25, 1956, the locality had been sufficiently specified with reference to the boundaries and names of Mouzas to render it a valid and competent notification under section 4. The Learned Judge further held that the said earlier preliminary notification cannot be said to have been superseded or not acted upon by the State and the said position according to the Learned Judge is well established by two-fold facts, namely, (1) the collector assessed the compensation at the rate prevailing in the locality at the time of the preliminary notification and (2) the State itself issued a second notification intending to take away the rights of the owners of the second notification to file objections under section 5A in respect of waste and arable lands. Such being the position, according to the learned Judge, the lands acquired should be valued on the basis of the market value as prevailing on the date of preliminary notification dated May 25, 1956, and not on the basis of the market value prevailing on the date of the second notification as claimed by the claimant/appellant.

7. Proceeding to consider the second issue, the learned Judge considered the documentary evidence led on behalf of the claimant as also the State no oral evidence having been led by either of the parties. While considering the documentary evidence relied on by the claimant the learned judge discarded the different sale deeds (Ext. 3 series) barring Ext. 3b principally on the ground that they represent sales at a time long after the relevant date, namely, May 25, 1956, although the learned judge gave additional reasons for discarding one or other of the said documents. Ext. 3b was discarded by him as the land conveyed thereby appurtenant to a different Mouza and there was no evidence how such lands could be compared to those for which compensation was being assessed. Moreover, it was found that Ext. 3b works out a rate of Rs. 2,500/- per acre which can hardly support the claim put forward by the claimant. Of the other two documents Ext. 1a and Ext. 1b the learned judge discarded Ext. 1a again principally on the ground that the same represents a sale dated June 18, 1964, long after the relevant date and also because of the fact that the land covered by the sale deed is situate within the municipal area quite near the industrial town, school, college, hospital and telephone exchange and there was no evidence to show how such land can be treated as a comparable unit for the land for which the compensation was being assessed. He, however, accepted the other document Ext. 1b though it represents a sale of the year 1964 since on the price the rate worked out was Rs. 4,000/- per acre in respect of a big plot. The learned judge discarded the Bynanamas (Ext. 2 series) for reasons similar to those for discarding Ext. 1a. Two awards relied on by the claimant, namely, Exts. 5 and 5a (the relevant decrees being Exts. 6 and 7) were discarded by the learned judge

on two-fold grounds, namely, (1) the notification under section 4 for such lands were issued in the year 1962 long after the relevant date and (2) that the lands thereunder acquired appertain to Mouza Birbhanpur, a Mouza different from Khantpukur and there being no evidence how such lands can be said to be comparable to the lands for which compensation was being assessed. Other documents relied on by the claimant were held to be of no assistance for assessing the compensation as claimed by the claimant.

8. The learned judge then proceeded to consider the documents Ext. A series filed by the respondent-State. It was found that Exts. A to A3 represent sales between the years 1954 and 1956. On the findings of the learned judge Ext. A and Ext. A1 which respectively worked out the price prevailing in the year 1956 to be Rs. 1,900/- per acre and Rs. 1,500/- per acre may be taken into consideration for assessing the price of the bigger plot like plot No. 762 but those could furnish no basis for assessing the price of the other smaller plots. The learned judge, however, principally relied on Exts. A4, A5, A6 and A7 together with the claimant's document Ext. 1b in making the assessment. These documents Exts. A4 to A7 represent sales of the year 1964 and they work out the price not exceeding Rs. 4,500/- per acre. Accordingly, the learned judge concluded : "Having regard to the facts and circumstances and potential value of the land I hold that the market value of the large area of the suit plots was more or less about Rs. 4,000/- per acre and that of small area was more or less Rs. 6,000/- per acre in the locality at the time of preliminary notification. The acquired land in respect of case No. 58 of 1971 being two smaller plots and two bigger plots I hold that on an average the market value of those plots of land should be assessed at the rate of Rs. 5,500/- per acre for compensation." He made the award accordingly. Feeling aggrieved by the award so made the claimant has preferred the present appeal and in doing so, the claimant had originally limited her claim to the sum of Rs. 1,02,040/- being the difference between the compensation claimed at the rate of Rs. 1,00,000/- per acre and the compensation awarded, but that was later amended to Rs. 6,89,400/-

9. Mr. Gupta appearing in support of this appeal has strongly assailed the findings of the learned judge on both the issues, as aforesaid. According to Mr. Gupta on the facts and circumstances of the present case in determining the amount of compensation for the lands acquired, the court under section 23 (1) should have taken into consideration the market value of the land at the date of the second notification under section 4, namely, August 10, 1964, and not the earlier preliminary notification. According to Mr. Gupta the preliminary notification was not a competent or a valid notification under section 4 of the Act and in any event the respondent-State itself having superseded the said notification,

the date of the preliminary notification could have no relevance in the matter of determination of compensation. According to Mr. Gupta this position is well established by the decision of this court in the case of *Jogendra Nath Chatterji* (supra) and the unreported decision of the Supreme Court in the case of (2) *Bhutnath Chatterji v. The State* in Civil Appeal No. 654 of 1966 disposed of on March 14, 1969, referred to and relied on by the Calcutta decision itself and the learned judge was in error in distinguishing the said decision on grounds which can hardly be sustained. According to Mr. Gupta once this court accepts his first contention the award as made and the compensation as assessed must necessarily be set aside as the same was made with reference to the market value prevailing at a time 8 years prior to the relevant date, namely, August 10, 1964. Necessarily, Mr. Gupta invited us to accept the appellant's claim in this appeal and assess the compensation for the lands acquired at the rate at least of Rs. 1,00,000/- per acre in view of Ext. 3 series. Strong reliance is placed by Mr. Gupta on Ext. 3g, a sale deed dated April 24, 1964, whereby 1 cent of land from each of the 4 plots acquired were sold by the claimant at a price which works out a rate of Rs. 1,85,000/-per acre and that being the best evidence it is contended by Mr. Gupta that we should make the assessment on the basis of the said document. At the hearing Mr. Gupta pressed before us an application for additional evidence under Order 41 Rule 27 of the Civil Procedure Code in respect of certain subsequent awards made by the Land Acquisition Judge, Burdwan, in respect of other lands covered by the same notification and declaration wherein the learned judge had not only accepted the plea put forward on behalf of the claimant that the compensation should be determined with reference to the price prevailing on the date of the second notification and not the preliminary notification but assessed the compensation at or about the rate of Rs. 1,80,000/- per acre.

10. Mr. Das appearing on behalf of the respondent-State has contested each of these points raised by Mr. Gupta. According to Mr. Das the learned judge has correctly decided that the compensation should be determined with reference to the market value prevailing on the date of the preliminary notification and not the second notification as according to Mr. Das the mere fact that there had been successive notifications under section 4 does not rule out the first of such notification in the series. Mr. Das has next contended that if this court does not accept the conclusion of the learned judge that the compensation is to be assessed with reference to the date of the preliminary notification, then the matter should be sent back to the court below for a fresh determination because on the evidences now available to this court it would be difficult to determine what should be the fair compensation. It has been pointed out by Mr. Das that the documents produced show varying prices of lands prevailing even in the year 1964. While Ext. 1b and Exts. A4 to A7 make out a price not

exceeding Rs. 4, 500/- per acre some of the documents in Ext. 3 series work out prices at rates anything between Rs. 1,80,000/- to Rs. 6,00,000/-. In the absence of any evidence as to how far the lands covered by these different documents are comparable to the lands for which the compensation is being determined it would be difficult for this court to make the assessment. So far as Ext. 3g is concerned, Mr. Das has contended that it is necessary to find out how far this sale represents any bonafide transaction. According to Mr. Das it is rather strange that land measuring only 1 cent from each of the 4 plots together with another plot being plot No. 912 was being sold by the claimant to one person Lalit Kumar Roy just a few months prior to the second notification. The plots are not contiguous to each other and it is difficult to appreciate how a purchaser purchases the lands measuring 1 cent from each of those plots differently situated and for what purpose. Mr. Das has further drawn our attention to the fact that while the claimant by her documents Exts. 3e and 3c both dated April 18, 1964, had been selling lands out of plot Nos. 1209, 1210 and 1211 at prices which work out at Rs. 3½ lakhs per acre it is rather strange that she herself purchases two months earlier such lands by Ext. A6 which works out the rate of Rs. 2,250/- per acre. In such circumstances, Mr. Das has contended that in case the award as made is not upheld by this court the proceeding should be remanded for a thorough investigation as to the bonafides of the different transactions represented by Ext. 3 series and also to find out how far lands covered thereby can be held to be comparable to the lands for which the compensation is being determined. So far as the application for additional evidence is concerned, it has been contended by Mr. Das that since appeals are pending against those awards this court should not admit them as additional evidence because the awards are not final.

11. We have carefully considered the rival contentions raised before us. In our considered opinion, however, the decision of the learned judge of the first issue cannot be sustained. In our view there is no distinguishing feature between the present case and the case of *Jogendra Nath Chatterji* (Supra) on which reliance was placed by the claimant before the learned judge. The distinction which was sought to be made by the learned judge is, in our opinion, based upon a clear misreading of the preliminary notification dated May 25, 1956. We have set out the relevant part of the notification hereinbefore. It would appear clear from the preliminary notification itself that the locality notified out of which the land is likely to be needed for public purpose is on the face of the notification the District of Burdwan. Clearly, there was no specification of that locality. What was specified in such notification was the general route of the survey for the purpose of section-4(2) of the said Act. The learned judge misconstrued the notification in thinking that what was specified for

the purpose of such survey constitute the locality notified as likely to be needed for a public purpose under section 4(1) of the Act. Under section 4(1) of the Act. the Governor is to notify the land in any locality which is needed or likely to be needed for public purpose. On such a notification being issued the Governor may under sub-section (2) authorise any officer to enter upon and survey and take levels of any land in such locality. The authorisation under sub-section (2) may be in respect of land which need not necessarily be the entire land which is notified under sub-section (1) as the land likely to be needed for a public purpose and as such specification of land to be surveyed cannot be read as specification of land or the locality in which the land is likely to be needed for a public purpose. There can be no dispute that in order to be a competent and effective notification under sub-section (1) of section 4 of the Act, the land has to be specified with that amount of certainty as would enable the people to put forward their objections under section 5A. Therefore, we are of the opinion that merely because the preliminary notification had set out, with reference to the boundary and name of Mouzas the general route of survey it must be held that the notification specifies the land or the locality in which land is likely to be needed for a public purpose and as such may be acquired as held by the learned judge. The learned judge, further failed to appreciate that on its face the preliminary notification did not invite any objection under section 5A and was intended for no other purpose than for exploring the area through a survey authorised thereby. Construing a comparable notification the Supreme Court in the case of *Bhumath Chatterji* (supra) had observed : . "The circumstances that an enquiry under section 5A after consideration of objections raised by the claimants and that the report of the collector were not made may reasonably justify the inference that the previous notification dated January 12, 1955, was not acted upon or was not intended to be acted upon." If there was any doubt about this position it must be held that the same was removed by the second notification issued under section 4(1) on August 10, 1964. No evidence was led why issue of a second notification was considered necessary if the earlier one was intended to be an effective notification for the purpose of section 4(1) of the Act. In the very same *Bhumath Chatterji's* case it was pointed out by the Supreme Court that where the Government does not choose to explain the reasons which persuaded it to issue a second notification the court may be justified in inferring that it was intended to supersede the earlier by the latter. The Learned Judge appears to have accepted the suggestion of the learned Government pleader as to the reasons for the second notification though no evidence on the point was adduced on behalf of the State but the reason suggested by the learned Government pleader if accepted

would fully support Mr. Gupta's contention that the preliminary notification was not intended to be an effective notification for the purpose of section 4(1) nor was it acted upon. The reason suggested was to enable people to file objections under section 5A. Such reason necessarily postulates that the preliminary notification never offered any opportunity to the people to file any objection to the proposed acquisition and if that was the position it would not be a competent notification under section 4(1) at all. In our opinion, Mr. Gupta is right in his contention that the two factors which were relied on by the learned judge for coming to the conclusion that the preliminary notification was really acted upon as a valid and competent notification under section 4(1), can hardly support such a conclusion. The first factor which prevailed with the learned judge is the fact that since the collector was assessing compensation with reference to the rate prevailing on the date of the preliminary notification, the said notification must be said to have been acted upon. In our opinion, there is an error in the process of reasoning because the very assessment of the collector is under challenge before the learned judge and the question under consideration by the learned judge was whether the State Government intended to act upon the previous preliminary notification as a competent and valid notification under section 4(1) of the Act or not. Such an issue has to be decided first by the collector and then by the learned judge and a wrong decision of the collector on the point could not have been used as evidence to show that the State Government acted upon the notification. The other reason given by the learned judge is that when by the second notification the State Government took away the right of the owners of the waste and arable lands to file objections that very fact shows that the first notification was intended to be acted upon. We cannot but point out that here again the learned judge has misread the second notification. The second notification was not made as a corollary to the preliminary notification nor to supplement the same. The second notification is a combined notification under sections 4(1) and 17(4) of the Act. Objections under section 5A were ruled out under section 17(4) in respect of such waste and arable lands as are covered by the same notification in so far as it is under section 4(1) of the Act and not the earlier preliminary notification. There would have been some merit in the reasoning given by the learned judge had this second notification been made only under section 17(4) of the Act and not in the manner made. The fact that the State Government thought it necessary that there should be a fresh notification under section 4(1) of the Act would necessarily lead to the conclusion as pointed out by the Supreme Court that the earlier one was not intended to be acted upon. This position was amply made clear by the Bench decision of this court in the case of *Jogendra Nath Chatterji* (supra), the true implication whereof the learned judge failed to appreciate. Such being the position, we must hold that the claimant/

appellant is entitled to get compensation which should be determined with reference to the market value of the land prevailing on the date of the second notification, namely, August 10, 1964, and not the date of the preliminary notification, namely, May 25, 1956 as wrongly held by the learned judge.

12. This leads us to consider the other issue regarding the determination of the compensation. Obviously, the determination as made by the learned judge must be set aside since the same was made on our findings arrived at hereinbefore on an erroneous basis. Therefore the only question left for our consideration is as to whether on the evidence already on record we should determine the compensation with reference to the market value prevailing on August 10, 1964. We have very carefully considered the rival contentions of the learned advocates appearing for the appellant and the respondent on this issue and we feel no hesitation in agreeing with Mr. Das that there can be no alternative to remanding the case to the trial court for re-determination on further evidence. Though strong reliance is placed by Mr. Gupta on Ext. 3g by which land measuring 1 cent from each of these plots were sold by the claimant a few months prior to August 10, 1964, at a price which works out a rate of Rs. 1,85,000/- per acre we are of the opinion that it would be necessary to consider the bonafides of such a transaction. The circumstances pointed out by Mr. Das raise a doubt in our mind which in order to be resolved require further evidence to be taken regarding the said transaction. Similarly, the other documents principally relied on by the claimant indicate variations in the price to such a great extent that it is difficult for us to arrive at a norm. More so, in view of the 5 documents referred to by Mr. Das, namely, Exts. A4 to A7 and Ext. 1b. Moreover, no oral evidence having been led and no local inspection, being made it is difficult for this court to find out how far the lands which were the subject matter of sale in the different deeds in Ext. 3 series which were relied on by the claimant would be comparable to those for which the compensation is being determined. Even the bonafides of some of these transactions are also open to doubt in the circumstances as pointed out by Mr. Das having reference to Ext. A6 and Exts. 3c and 3e referred to hereinbefore. In our opinion, it is necessary that further evidence should be led to dispel such doubts before any reliance can be placed on such transactions. Such being the position, we cannot but remand this case to the trial court for re-trial on further evidence to be led by the parties.

13. Before we conclude we must dispose of the application for additional evidence filed on behalf of the appellant. In our opinion though the appellant wants to rely upon such awards subsequently made since the awards themselves are now under appeal in this court it would not be

proper for us to take such awards as additional evidence. The awards are yet to reach their finality. Moreover, such awards to the extent they were made with reference to the document dated April 24, 1964 of the claimant/appellant Sachibala Roy is concerned, since that document itself raises some doubt in our mind as to its bonafides we cannot rely upon the awards made on the basis thereof until our doubt is dispelled particularly when those are being challenged in appeals to this court.

14. In the result, the appeal is allowed and the award as made in L.A. Case No. 58 of 1971 is set aside. The case is remanded for retrial in the light of our decisions indicated hereinbefore. Parties will bear their respective costs.

Chakrabarti. J. : I agree.

N. C. S.

[SPECIAL JURISDICTION (INCOME TAX)]

Before Mr. Justice Dipak Kumar Sen and Mr. Justice

Chandan Kumar Banerjee

Decision : July 13, 1978

Commissioner of Income Tax, West Bengal-I ... Applicant

Versus

Southern Bank Ltd. (Since Amalgamated with United

Industrial Bank Ltd.) ... Respondent*

Merger of two Banks—Whether the amalgamated Bank is an assessee — Whether amalgamated Bank can claim refund due to the Amalgamating Bank before merger. Section 2(2), 26(2), 30(1) and 33(1) of the Indian Income Tax Act, 1922, Sections 2(7), 170(1), 237, 246, 253 of the Income Tax Act, 1961.

The Southern Bank Ltd., a Banking company, had filed three returns of its income in respect of assessment years 1961-62, 1962-63 and 1963-64 respectively dated the 11th September, 1961, 25th September, 1962 and the 26th June, 1963. The previous years relevant to the said assessment years, were the respective calendar years 1960, 1961 and 1962. Under the scheme prepared under section 45 of the Banking Companies Act, 1949 by the Reserve Bank of India and sanctioned by the Central Government by a notification dated the 19th August, 1964, the Southern Bank Ltd., was amalgamated with the United Industrial Bank Ltd. and was required to close its books of account on the 22nd April, 1964.

The Income Tax Officer disposed of the pending assessments of the Southern Bank Ltd. by observing that for the assessment years 1961-62, 1962-63 and 1963-64 the assessee could not be found and as such the

**Income-Tax Reference No. 489 of 1971.*

proceedings were dropped. As the refunds had become due to the Southern Bank Ltd. in the said assessment years, appeals were preferred before the Appellate Asstt. Commissioner, who, dismissed the appeals. Thereafter, further appeals were preferred before the Tribunal. The Tribunal set aside the order of the Appellate Asstt. Commissioner and restored the appeals to his file and directed him to decide the appeals *denovo*. On a reference at the instance of the Revenue :

HELD : (a) *The United Industrial Bank Ltd. in law became competent to act on behalf of the Southern Bank Ltd after the amalgamation. Therefore, Memoranda of appeals were properly signed by the United Industrial Bank Ltd.*

(b) *The findings of the Tribunal that it was the Southern Bank Ltd. who had filed appeals and that it was the United Industrial Bank Ltd. which continued to proceed with the appeals had not been challenged by the Revenue. When the proceedings were disposed of by the Income Tax Officer, it was the United Industrial Bank Ltd. which could continue the proceedings and necessarily had the right to file appeals therefrom.*

Cases referred to :—

- (1) *Commissioner of Excess Profits-Tax, West Bengal v. Ramnath Bajoria*, 19 ITR 79
- (2) *Seth Badridas Daga & Another v. Commissioner of Income Tax, Central and United Provinces*, 17 ITR 209

<i>B. L. Pal, and Ajit Sengupta</i>	...	...	...	<i>For the Revenue</i>
<i>Debi Pal. P.K. Pal & R.N. Dutt...</i>	...	...	...	<i>For the Respondent</i>

The judgment of the Court was as follows :—

Sen, J. : The unusual facts which have led up to the present reference are shortly as follows : The Southern Bank Ltd., a banking company, had filed three returns of its income in respect of assessment years 1961-62, 1962-63 and 1963-64 respectively dated the 11th September, 1961, 25th September, 1962 and the 26th June 1963. The previous years relevant to the said assessment years were the respective calendar years 1960, 1961 and 1962. Under a scheme prepared under section 45 of the Banking Companies Act, 1949 by the Reserve Bank of India and sanctioned by the Central Government by a notification dated the 19th August, 1964, the Southern Bank Ltd. was amalgamated with the United Industrial Bank Ltd. and was required to close its books of account on the 22nd April, 1964.

2. The relevant provisions of the said scheme were, *inter alia*,

(a) From the prescribed date all rights, powers, claims, demands, interests, authorities, privileges, benefits, assets and properties of the Southern Bank Ltd. moveable and immoveable, including property, rights and assets of every description including all rights or action would stand

transferred to and become the properties and assets of the United Industrial Bank Ltd.

(b) From such prescribed date all liabilities, duties and obligations of the Southern Bank Ltd. would be and become the liabilities, duties and obligations of the United Industrial Bank Ltd.

(c) All contracts, bonds, agreements, powers of attorney, grants of legal representation and other instrument of whatever nature subsisting or having effect immediately before the prescribed date shall be effective to the extent as if instead of the Southern Bank Ltd. the United Industrial Bank Ltd. had been a party thereto or as if they have been issued in favour of the United Industrial Bank Ltd.

(d) If on the prescribed date any suit, appeal or other legal proceedings of whatever nature by or against the Southern Bank Ltd. would be pending the same would not abate, or be discontinued or be in any prejudicially affected but would subject to the other provisions of this scheme be prosecuted and enforced by or against the United Industrial Bank Ltd.

3. On the 30th January, 1965, the Income Tax Officer disposed of the pending assessments of the Southern Bank Ltd. by making an order as follows :

"It is learnt that the assessee's business was completely taken over by the United Industrial Bank from 24th August, 1964. Therefore, the assessments for the year 1963 (Assessment year 1964-65) and for the period from 1st January, 1964 to 23rd August, 1964 (Assessment year 1965-66) can only be completed on the successor Bank.

As the assessee cannot be found the assessment for the assessment years 1961-62, 1962-63, 1963-64 are dropped."

4. As refunds had become due to the Southern Bank Ltd. in the said assessment years appeals were preferred from the order dropping the assessment proceedings to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner found, *inter alia*, that the returns in respect of the said years had been signed by the General Manager of the Southern Bank Ltd. and that the representatives of the Southern Bank Ltd. had attended before the Income Tax Officer at the said proceedings. He also found that the name of the appellant in the Memoranda of Appeals was given as the Southern Bank Ltd. and the address was also shown as that of the said Bank. The Memoranda had however been signed on behalf of the United Industrial Bank Ltd. After construing the scheme, the Appellate Assistant Commissioner found that though Southern Bank Ltd. had neither been completely merged with the United Industrial Bank Ltd. nor had been dissolved. He did not accept the finding of the Income Tax Officer that the Southern Bank Ltd. was an assessee who could not be found. He, however, held that the United Industrial Bank Ltd. was not competent to file the said appeals inasmuch as it was not an

assessee for that purpose within the meaning of the Income Tax Act. Though under the scheme the assets and liabilities of the Southern Bank Ltd. were taken over by the United Industrial Bank Ltd. it did not affect their respective right and obligations under the Income Tax Act. Following a decision of this Court in (1) *Commissioner of Excess Profits-tax, West Bengal v. Ramnath Bujoria*, 19 ITR 79 he dismissed the appeals. From this order of the Appellate Assistant Commissioner a further appeal was preferred to the Income-tax Appellate Tribunal.

5. It was contended on behalf of the assessee before the Tribunal that the order of the Appellate Asstt. Commissioner was erroneous inasmuch as the United Industrial Bank Ltd. having become responsible for all the liabilities including the tax liabilities of the Southern Bank Ltd. came within the ambit of the expression "assessee" and that the said United Industrial Bank Ltd. was competent to prosecute the appeals.

The Tribunal, *inter alia*, found as follows :—

- (a) The Southern Bank Ltd. was the assessee.
- (b) It had become eligible for some refunds.
- (c) The order passed by the Income Tax Officer on the 30th January, 1965 was an assessment order.
- (d) As a result of the merger, the Southern Bank Ltd. did not lose its existence, though, it was denuded of all its assets and liabilities. It continued to be an assessee within the meaning of the expression in the Income Tax Acts of 1922 and 1961.
- (e) The Southern Bank Ltd. had preferred the appeals to the Appellate Assistant Commissioner.
- (f) The transfer of the liabilities of the Southern Bank Ltd. to the United Industrial Bank Ltd. and the vesting of the assets of the Southern Bank Ltd. in favour of the United Industrial Bank Ltd. had the effect of enabling the latter to continue the proceedings in appeal by reason of the overriding nature of section 45 of the Banking Companies Act.
- (g) With reference to any undischarged liability of the Southern Bank Ltd. including that of Income-tax only the United Industrial Bank Ltd. could be proceeded against. Therefore, the United Industrial Bank Ltd. was an assessee within the meaning of Section 2(2) of the Indian Income Tax Act, 1922 or section 2(7) of the later Act of 1961.

6. Accordingly the Tribunal set aside the order of the Appellate Asstt. Commissioner, restored the appeals to his file and directed him to decide the appeal *denovo*.

7. On an application under Section 256(1) of the Income Tax Act, 1961 the Tribunal has drawn up a statement of case and has referred for opinion of this Court the following question as a question of law arising out of its aforesaid order :—

"Whether, on the facts and in the circumstances of the case and

having regard to the scheme of merger, United Industrial Bank Ltd. was an assessee within the meaning of Section 2(2) of the Indian Income Tax Act, 1922 for the assessment year 1961-62 and Section 2(7) of the Income Tax Act, 1961 for the assessment years 1962-63 and 1963-64, so as to be in a position to file appeals before the Appellate Asstt. Commissioner and the Tribunal for securing the refunds (if any) due to Southern Bank Ltd. until its merger."

8. In order to appreciate the controversy in this reference it is necessary to refer to the sections involved. The relevant sections of the Indian Income Tax Act, 1922 are the following :—

Section 2(2) : "assessee" means a person by whom income-tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceedings under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him ;"

Section 26 (2) : "Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year :

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or whom the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid."

Section 30(1) : "Any assessee objecting to a refusal of an Income Tax Officer to allow a claim to a refund under section 48, 49 or 49F, or to the amount of the refund allowed by the Income Tax Officer under any of those sections, may appeal to the Appellate Asstt. Commissioner against ... such refusal or order :

Section 33(1) : "Any assessee objecting to an order passed by the Appellate Assistant Commissioner under Section 28 or Section 31 may appeal to the Appellate Tribunal within sixty days of the date on which such order is communicated to him."

The corresponding sections in the Income Tax Act, 1961 are as follows :—

Section 2(7): "assessee" means a person by whom any tax or any other sum of money is payable under this Act, and includes—

(a) every person in respect of whom any proceedings under this Act has been taken for the assessment of his income or of the income of any other person in respect of which he is assessable or of the loss sustained by him or any such other person or of the amount of refund due to him or to such other person ;

(b) every person who is deemed to be an assessee under any provision of this Act ;

(c) every person who is deemed to be an assessee in default under any provision of this Act ;"

Section 170 (1): Where a person carrying on any business or profession (such a person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession ;—

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place upto the date of succession ;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.

(2) Notwithstanding anything contained in sub-section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of the Act, so far as may be, apply accordingly.

(3) When any sum payable under this Section in respect of the income of such business or profession for the previous year in which the succession took place up to the date of succession or for the previous year preceding that year, assessed on the predecessor, cannot be recovered from him, the Income Tax Officer shall record a finding to that effect and the sum payable by the predecessor shall thereafter be payable by and recoverable from the successor, and the successor shall be entitled to recover from the predecessor any sum so paid."

Section 237 : "If any person satisfied the Income Tax Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess."

Section 246 : "Any assessee aggrieved by any of the following ,

orders of an Income Tax Officer may appeal to the Appellate Assistant Commissioner against such order.

(h) an order under sub-section (2) or sub-section (3) of section 170 ;

(n) an order under Section 237 ;”

Section 253 : Appeals to the Appellate Tribunal

“(1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order.

9. Mr. B. L. Pal, learned Counsel for the Revenue, contended at the hearing that the Appellate Assistant Commissioner has found that it is the United Industrial Bank Ltd. who had preferred the appeals from the order of assessment. The assessments having been made on the Southern Bank Ltd., the United Industrial Bank Ltd. was not competent to prefer the appeal as the assessee and, therefore, the appeal to the Appellate Assistant Commissioner was incompetent.

10. Mr. Pal further contended that the United Industrial Bank Ltd. did not come within the definition of “assessee” within the meaning of the said expression under the Income Tax Acts inasmuch as (a) nothing was payable by the United Industrial Bank Ltd. in respect of assessments on Southern Bank Ltd. under the Income-tax Act, or (b) no proceedings had been taken in respect of the United Industrial Bank Ltd. for assessment of its income or in respect of any amount of refund due, or (c) no proceeding had been taken for the assessment of Southern Bank Ltd. for which the United Industrial Bank Ltd. was liable.

11. Lastly, Mr. Pal submitted that the clear finding of the Appellate Asstt. Commissioner was that Memoranda of Appeal had been signed by the United Industrial Bank Ltd. This has also been confirmed by the Tribunal. Therefore, the United Industrial Bank Ltd. was and claimed to be appellant and proceeded accordingly. It was the Southern Bank Ltd. and not the United Industrial Bank Ltd. who was entitled to there refunds and therefore, the appeals could have been preferred only by the Southern Bank Ltd.

12. In support of his contentions Mr. Pal cited the following decisions.

(a) (2) *Seth Badridas Daga another v. Commissioner of Income Tax, Central and United Provinces*, reported in 17 ITR 209. This decision was cited for the following observations of the Judicial Committee :—

“It will be convenient to begin with section 23 which deals with assessment. Some confusion arises from the fact that in the Act the words ‘assessment’ and ‘assessee’ are used in a different places with different meanings. Section 2(2) defines assessee as “a person by whom income-tax is payable”, but the context in section 23 makes it clear that down at least to the middle of sub-section (5)(a) ‘assessee’ and ‘assessment’ refer primarily a person the amount of whose income is being computed.”

(b) *Commissioner of Excess Profits Tax, West Bengal v. Ramnath Bajoria*, reported in 19 ITR 79. The facts of this case are, *inter alia*, as follows : An unregistered firm was assessed to excess profit tax for the period ending on the 31st April, 1945. On the 23rd July, 1946 the business of the firm was sold. Under clause 7 of the agreement of sale outstanding excess profit tax was put to the account of the purchaser who undertook to meet the liability. A notice of demand for realisation of the said tax was served on the purchaser. On a reference, it was held by a division Bench of this Court that even if the purchaser was liable under clause 7 of the agreement, the Income Tax Authorities could not take advantage thereof. The statute did not make the purchaser liable and therefore, he could not be made chargeable for the payment of this amount.

13. Mr. Pranab Pal, learned counsel for the assessee, has contended on the other hand, that the United Industrial Bank Ltd. was an assessee under the provisions, of the Income Tax Acts. Under the scheme, the United Industrial Bank Ltd. stood substituted in the place and stead of Southern Bank Ltd. in respect of all rights and liabilities of the Southern Bank Ltd., including all pending proceedings under the Income Tax Act. Sub-section (14) of section 45 of the Banking Companies Act, provided as follows :—

“(14) The provisions of this section and of any scheme made under it shall have effect notwithstanding anything to the contrary contained in any other provisions of this Act or in any other law or any agreement award or other instrument for the time being in force.”

14. Mr. Pranab Pal submitted further that under the scheme it was only the United Industrial Bank Ltd. which could claim for refund, and accordingly, the United Industrial Bank Ltd. come within the meaning ‘assessee’ as given in section 2 sub-section (2) of the Indian Income Tax Act, 1922 or section 2(7) of the Income Tax Act, 1961. He also submitted that under section 26 (2) of the earlier Act corresponding to section 170(1) of the latter Act, by reason of the succession effected by the scheme tax assessed on Southern Bank Ltd. would in certain circumstances be payable by its successors United Industrial Bank Ltd. in the event Southern Bank Ltd. could not be found.

15. Mr. Pranab Pal finally submitted that the decisions cited on behalf of the Revenue had no application in the facts and circumstances of the instant case. In *Ramnath Bajoria* (Supra) this Court held that the Revenue could not charge a person with tax liability even if he has assumed such liability under a private agreement. In the instant case, the liability as also all rights vested in the successor under a statutory scheme.

16. The decision of the Privy Council in *Seth Badridas Daga* (Supra) laid down that an assessee was primarily a person the amount of whose income is being computed but this observation did not preclude other

persons also being considered as assesseees. The Privy Council was concerned only with section 23 of the Act of 1922 and had no occasion to consider the effect of a succession.

17. In our opinion, the contentions of the Revenue have no merit whatsoever. The Tribunal has found as fact that it was the Southern Bank Ltd. which was entitled to a refund and had preferred the appeals. One of the questions suggested by the Revenue in the Reference Application was as follows :—

“Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that in view of amalgamation of the assessee with United Industrial Bank Ltd. under Section 45 of the Banking Companies Act, 1949, the said United Industrial Bank and not the assessee was competent to continue the appeal before the Appellate Asstt. Commissioner and to file further appeal before the Tribunal as a successor company by virtue of section 26 (2) of the Indian Income-tax Act, 1922 ?”

This suggested question indicates, that it was understood, that Southern Bank Ltd. was the assessee and that this assessee had filed the appeals before the Appellate Assistant Commissioner, the only question being whether by reason of the succession by the United Industrial Bank Ltd. the Southern Bank Ltd. was competent to continue to proceed with the appeals thereafter.

18. Apart from that, we find from the records that it was clearly stated that Southern Bank Ltd. was the appellant before the Appellate Asstt. Commissioner. Memoranda of the appeals might have been signed by the General Manager of the United Industrial Bank Ltd. but under the Income Tax Rules 1962, the form of appeal can be signed under the sub-rule (2) (f) of rule 45 by any person competent to act on behalf of the assessee. In our opinion, the United Industrial Bank Ltd. in law became competent to act on behalf of the Southern Bank Ltd. after the amalgamation. Therefore, Memoranda of appeals were properly signed by the United Industrial Bank Ltd.

19. The finding of the Tribunal that it was the Southern Bank Ltd. who had filed the appeals and that it was the United Industrial Bank Ltd. which continued to proceed with the appeals has not been challenged by the Revenue. We also note that the assessment proceedings of Southern Bank Ltd. were pending till the 30th January, 1965 when they were disposed of by the Income Tax Officer. On that date under the Scheme it was the United Industrial Bank Ltd. which could continue the proceedings and necessarily had the right to file appeals therefrom.

20. We are not at all impressed by the hyper-technical objections as have been pressed by the Revenue in this case. We also note that the question which has been drawn up by the Tribunal and referred does not arise from the order of the Tribunal. The questions which were asked for

by the Revenue were rejected and no steps were taken by the Revenue to have the proper question or questions referred. Strictly speaking, it would not have been necessary for us to answer the question at all. However, in view of the fact, that matter has been gone into in some detail, we answer the same. The question is answered in the affirmative and in favour of the assessee. In the facts and circumstances the assessee will be entitled to costs of this Reference. Certified for two counsel.

Banerji, J. : I agree.

A. S. G.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Sankar Prasad Mitra, Chief Justice and Mr. Justice

Salil Kumar Datta

Decision : July 28, 1978

The Calcutta Electric Supply Corporation Ltd. ... Appellant
Versus

P. C. Sen and others ... Respondents*

**Industrial Disputes Act 1947, secs. 12(1), 12(4), 33 and 33(2)(b)—
Conciliation proceeding—Whether presence of Minister vitiates conciliation
proceedings—Whether employer can apply under sec. 33(2) (b) without
prejudice to his right that sec. 33(2)(b) is not attracted.**

Respondent No. 2 is a clerk of the appellant company. The company charged him for misappropriation of Rs. 28000. The company held departmental enquiry and dismissed him from service on August 3, 1976. The Company on August 3, 1976 made an application under sec. 33(2)(b) of the Industrial Disputes Act 1947, to Respondent No. 1 for approval of the order of dismissal. Thereupon Respondent No. 1 heard the parties and passed an order on April 5, 1977. It was held that with regard to two disputes, namely, "Absence due to sickness" and "Age verification", there was no industrial dispute pending but with regard to charter of demands, tripartite meetings were held in the chamber of the Labour Minister at Writers Buildings where some disputes were settled while certain other disputes were still under discussion. Respondent No. 1 held that the company dismissed respondent No. 2 from service on August 3, 1976 during the pendency of the conciliation proceedings in respect of certain disputes on the charter of demands, and directed the company and the respondent No. 2 to appear before him for further hearing of the case on April 22, 1977. The company then moved a writ petition for setting aside the said order. The company contended that the conferences held in the

*Appeal No. 545 of 1977.

presence of the Labour Minister ceased to have the character of conciliation proceedings as the conciliation officer could have no control over the discussions between the company and the workmen in presence of the Minister.

HELD : In conciliation proceedings, the procedural requirement under sec. 12(2) must be strictly complied with. The conciliation officer in such conferences where the Minister is present to aid and advise must not abrogate his functions and duties but take such active part as required under sec. 12(2) by way of investigation of dispute and doing all such things as he may think fit for inducing the parties to come to a fair settlement. The good offices of the Minister will be a substantial assistance but the ultimate control should always be with the conciliation officer. The mere presence of the Minister and his participation in the conciliation proceeding in aid of settlement will not vitiate the conciliation.

Under sec. 12(1) of the Act the conciliation officer has to hold conciliation proceeding whenever an industrial dispute exists and such proceeding shall be deemed to be completed *inter alia*, where his report is received by the government under sec. 12(4). In the instant case conferences were held following notice of respondent No. 1 dated April 20, 1976 and the Report of the conciliation officer under sec 12(4) was received by the government on November 17, 1976. It is clear that the conciliation proceeding was pending on August 3, 1976 when the workman was dismissed from service. The company was entitled while filing the application for approval under sec. 33 to urge before the conciliation officer in its application under sec. 33(2)(b) that no conciliation proceeding was pending at the material time and consequence of sec. 33 (2)(b) was not attracted to the dismissal of the workman. The appeal fails and is dismissed.

Cases referred to :—

- (1) *Nagarcoil Electric Supply Corporation v. Industrial Tribunal, Trivandrum*, AIR 1953 TC 167
- (2) *Employees of the Caltex (India) Ltd. v. The commissioner of Labour and Conciliation Officer*, AIR 1959 Mad 441
- (3) *Delhi Cloth and General Mills Co. v. Ludh Budh Singh*, AIR 1972 SC 1031
- (4) *Tata Iron & Steel Co. Ltd. v. D. R. Singh*, AIR 1966 SC 288

<i>P. P. Giltwalla and Arijit Choudhury</i>	...	...	<i>for the Appellant</i>
<i>A. Dutta, (Junior Standing Counsel)</i>	...	...	<i>for Respondents Nos. 1&3</i>
<i>Sunit K. Dutt</i>	•	...	<i>for the Respondent No. 2</i>

The judgment of the Court was as follows :—

Datta, J. : This is an appeal against the judgment of Sabyasachi Mukharji, J. dated August 25, 1977 whereby the rule obtained by the appellant, the Calcutta Electric Supply Corporation Ltd. (hereinafter referred

to as the Company) on an application under Article 226 of the Constitution was discharged. The facts giving rise to the proceeding, according to the Company, are as follows :—

2. The Company is carrying on the business of generation and distribution of electricity for reward and the respondent No. 2 Amaresh Roy was a clerk in its Revenue Department. On August 3, 1976 the Company dismissed Roy for having misappropriated money belonging to the Company. At the time of dismissal no Conciliation proceeding under the Industrial Disputes Acts, 1947 was pending between the Company and its workmen before any Conciliation Officer. As a matter of abundant caution the Company made an application before P. C. Sen, Conciliation Officer and Joint Labour Commissioner, Government of West Bengal under Section 33(2)(b) of the Industrial Disputes Act for approval of the said dismissal. It was stated in the application which is dated August 3, 1976 that the said workman was asked to show cause against the allegations of having illegally collected cash from the consumers of the Company as specifically named against electric bills for about Rs. 28000/- and also for having misappropriated the same. The workman replied to the said show cause notice which was found to be unsatisfactory and thereafter in accordance with its Standing Orders an Enquiry Committee was constituted. Enquiry was held on June 25, 1975 and the appellant was given opportunity to defend his case. After the conclusion of the enquiry the enquiry proceeding along with the findings of the Enquiry Committee were forwarded to the Deputy Chief Commercial Officer who sent it again to the Chief Commercial Officer. The management considered the enquiry report and came to the conclusion that the workman was guilty of the charges proved against him and that he should be dismissed in absence of any extenuating circumstances. The Company thereafter dismissed the workman concerned by order dated August 3, 1976 and offered him one month's wages in terms of Section 33(2)(b) of the Industrial Disputes Act. The Company on the same day submitted an application to the Conciliation Officer and Joint Labour Commissioner, Government of West Bengal, for approval of the action taken as it might be contended that certain industrial disputes between the Company and its workmen were pending before him. It was accordingly prayed that the approval should be given to the action taken by the Company dismissing the workman as stated above.

3. This application came up before P. C. Sen, Conciliation Officer and Joint Labour Commissioner, Government of West Bengal, the respondent No. 1 who though he was also the Conciliation Officer, was not described as such in the Company's application under Article 226. P. C. Sen as the Conciliation Officer heard the parties and passed an order on April 5, 1977 on the said application. It was held that in regard to two disputes namely "absence due to sickness" and "age verification" there was no industrial dispute pending before the Conciliation Officer. In

regard to the Charter of Demands, which was the third item of dispute, it appears the Co-ordination Committee of CESC Unions submitted a charter of demands to the Joint Labour Commissioner, West Bengal on April 17, 1976 whereon the said Officer issued a notice to the Company and the Unions to attend tripartite meeting at the chamber of the Labour Minister at Writers Buildings on April 26, 1976 for discussion. After protracted discussion, a settlement was reached on February 10, 1977 in respect of some disputes and there was another tripartite settlement which was signed on March 31, 1977 in respect of some other disputes. The Conciliation Officer further stated in his said order that a report under section 12(4) of the Industrial Disputes Act was submitted by him, when at one stage, prospect for the settlement seemed to be bleak. This report was filed in the month of November, 1976 to the Labour Department, Government of West Bengal. It was held that the Company dismissed the workman from service on August 3, 1976 during the pendency of the conciliation proceeding in respect of certain dispute particularly on the charter of demands and therefore the Company's contention in respect thereof was erroneous and provisions of section 33(2)(b) were attracted in this case. The order concluded with the following directions :—

“the under signed as a Conciliation Officer, therefore deemed it fit to order that the Company's preliminary objections regarding coverage under section (33)(2)(b) of the I. D. Act are not tenable in law and in fact. The C. E. S. C. management and the worker concerned are therefore requested to appear before the undersigned for further hearing of the case on 22. 4. 77 at 3-30 p. m.”

The petitioner moved this Court against this order on June 9, 1977 and obtained a rule calling upon the respondent no. 1 P. C. Sen, the Joint Labour Commissioner of the Government of West Bengal, the workman as also the State of West Bengal to show cause why a writ in the nature of certiorari should not be issued setting aside, cancelling or quashing the order dated April 5, 1977 passed by the respondent No. 1 and also why a writ in the nature of prohibition should not be issued commanding them not to proceed further in the said application or to exercise jurisdiction in any manner in respect thereof. There was, it appears, a stay of further proceeding in the meantime till the disposal of the rule.

4. Cause was shown by the workman stating that at the time of his dismissal there was a conciliation proceeding pending which terminated in the two settlements mentioned above. As the conciliation was pending the Company made an application under Section 33(2)(b) of the Industrial Disputes Act. There was an affidavit-in-opposition affirmed by the said P. C. Sen, the Joint Labour Commissioner, respondent No. 1 on July 28, 1977 in which it was stated that pursuant to the notice given on the charter of demands dated April 17, 1976 reference was made to the tripartite level

for fresh conciliation in accordance with the bipartite agreement dated June 28, 1975. It was stated further therein as follows :—

“... ..The subsequent meetings and conferences before the Labour Minister, Government of West Bengal, where in most cases the Conciliation Officer was present were a part of the conciliation proceedings by the Conciliation Officer. Section 12(2) of the Industrial Disputes Act provides that the Conciliation Officer may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the disputes. Meetings and conferences before the Labour Minister, Government of West Bengal do and did in the instant case form a part of my attempt to induce the parties to come to a fair offer and amicable settlement of the disputes.”

It was further stated that the conciliation proceeding were continuing and in the midst of such proceedings some restive workers took some form of action in the context of which a partial settlement of the charter of demands was reached on February 10, 1977 in course of conciliation proceedings and signed by the Conciliation Officer and this was followed by another settlement on March 31, 1977. All these documents were signed by the deponent P.C. Sen as the Conciliation Officer with the full knowledge of the parties. It was further stated that the report under section 12(4) was submitted by the Conciliation Officer to the Government of West Bengal on November 11, 1976 and the subsequent meetings of the Labour Minister did not make it a bad report as alleged by the company.

5. The Company filed an affidavit-in-reply to the affidavit of the workman but it appears no affidavit-in reply was filed to the affidavit-in-opposition of P.C. Sen, the Joint Labour Commissioner.

6. The learned Judge was of opinion that the dispute about the age verification was a subject matter of the conciliation proceeding started on June 2, 1976 which was pending at the relevant date i.e. date of dismissal of the workmen on August 3, 1976. In regard to the charter of demands it was also clear that there were conferences initiated and attended by the conciliation officer where the dispute was negotiated as indicated above which resulted in the settlements of the disputes as aforesaid. During the pendency of the disputes, the Conciliation Officer in or about November 1976 made a report contemplated under section 12(4) of the Industrial Disputes Act. The court further held on consideration of the cases cited that the mere participation of the Minister as such would not make any proceeding not a conciliation proceeding provided it is shown that the Conciliation Officer was “there to discharge his duties and his discretion to ensure fair settlement between the parties”. In this case there was evidence that proceedings so initiated ultimately led to settlements and there was no evidence that the Conciliation Officer did not retain his superintendence over the terms bargained by the parties. The

court further held that the employer is entitled to seek, as a matter of caution, sanction or opinion of the appropriate authority as to whether any conciliation proceeding or industrial dispute was pending or not. In the view that was taken as indicated above, the application was dismissed and the rule was discharged, by order dated August 25, 1977 and the present appeal, as already stated, is against this decision.

7. At the hearing it has been contended by Mr. Dutta, learned Junior Standing Counsel that, of the three items of dispute namely (i) absence due to sickness (ii) age verification and (iii) charter of demands, the first item of the disputes was not pending. According to the Company the said dispute related to the implementation of the relevant clauses of the Standing Orders of the Company on which there could be no industrial dispute. As to the dispute in regard to the age verification Mr. Dutta said that the matter in question was filed prior to the material date and as such it could not be said that there was any conciliation proceeding pending thereon. The dispute however, relates to the third item, the charter of demands, which was pending on the material date.

8. It may be mentioned here that in respect of the charter of demands a memorandum of settlement was signed between the parties which provides the following terms : -

“(a) the conciliation proceedings pending on the tripartite level on the joint charter of demands will be treated as concluded with the signing of the tripartite agreement on the ‘Leave Travel Concessions’ as a part settlement of the charter ;

(b) the remaining issues of the Charter of Demands will be discussed at bipartite level with a view to reaching a settlement ;

(c) the parties (i.e. the Company and any of the Unions constituting the Co-ordination Committee) will be at liberty to refer the issue to tripartite level whenever any of them will desire to do so, when fresh conciliation will start in the matter.”

This settlement was entered into on June 28, 1975 by and on behalf of the Company and also the workmen's Unions.

9. Mr. Ginwalla, learned counsel appearing for the appellant company, submitted that whatever conciliation proceeding was pending prior to June 28, 1975 was to be treated as concluded with the signing of the bipartite agreement on leave travel concessions as a part settlement of the charter of demands. The agreement on leave travel concessions was signed on the same date i.e. June 28, 1975. It was clear that the conciliation proceedings then pending on the charter of demands was to be treated as concluded as provided thereunder. This also finds support in the other clause of this settlement which says that the remaining issues would be discussed at the bipartite level and the parties would be at liberty to refer the issues remaining unsettled to the tripartite level whenever

any of them would desire so when fresh conciliation would start in the matter. It is obvious therefore, that on or about in June 28, 1975 the conciliation proceedings then pending came to end.

10. It is now to be considered whether there was any conciliation proceeding thereafter and was pending prior to the material date i. e. August 3, 1976 and on this issue the parties are at variance. It appears that the Co-ordination Committee of the Unions submitted a representation on April 17, 1976 addressed to P. C. Sen, as Joint Labour Commissioner alleging that though several meetings have been held with the management at bipartite level as well as before the Minister of Labour at tripartite level no settlement was reached due to the adamant attitude of the Company. In accordance with the Clause (c) of the settlement of June 28, 1975 the Unions referred the pending dispute for fresh conciliation. On this letter P. C. Sen, Joint Labour Commissioner issued a notice on the Company and the four Unions of its workmen directing them to send their representatives "to attend tripartite meetings to be held in the chamber of the Labour Minister at writers Buildings on June 26, 1976 at 3 p.m. and the discussion if necessary, would be continued on 27th and 28th June as well."

11. It appears that in pursuance thereof series of conferences were carried on wherein the Company and the Unions of its workmen duly participated. The Joint Labour Commissioner, the respondent No. 1 sent a report to the Government in November 1976 when the chances of settlement were bleak. It further appears that there was a strike by workmen which was settled by a tripartite agreement in writing dated February 10, 1977, which *inter alia* provided for bilateral discussions for settlement of the charter of demands except on matters therein settled. The settlement further provided that the recommendations of the Expert Committee dated January 31, 1977 set up by the Government in the meantime on June 10, 1976 on the computer would also be taken up for discussion by the parties. The Company started operation of the computer on March 1, 1977 on the basis of its unilateral decision which was objected to by the workmen leading to agitation and thereafter there was a tripartite settlement in writing on March 31, 1977 on the charter of demands.

12. Mr. Ginwalla firstly contended that the initiation of the proceeding on April 24, 1976 was by P. C. Sen in his capacity as the Joint Labour Commissioner as would be evident from the notice itself. So that the conferences held on basis thereof could not be said to be conciliation proceedings at all, as the conciliation proceeding under the Industrial Disputes Act has a special legal character and status, creating legal rights in favour of the workmen as also of the employer. The Junior standing Counsel referred to the following notification of the Government of West Bengal in the Labour Department.

GOVERNMENT OF WEST BENGAL.
LABOUR DEPARTMENT.

Notification.

No. 3542-IR

I.R/12 L-5467.

Calcutta, the 27th July, 1967.

In exercise of the power conferred by Section 4 of the Industrial Disputes Act, 1947 (Act 14 of 1947), the Government is pleased hereby to appoint the Joint Labour Commissioner, West Bengal, to be a Conciliation Officer for the purposes of the said Act for the whole of West Bengal.

By order of the Government
D. Chatterjee.
Jt. Secretary to the Govt. of
West Bengal

It thus appears therefrom that the Joint Labour Commissioner of the Government of West Bengal is also a Conciliation Officer under the Industrial Disputes Act and acts as such in the matter of settlement of labour disputes in the industry as a Conciliation Officer. His description however is not always accurate in that his capacity also as Conciliation Officer is not generally mentioned which however should be done as required in law. Even so, as the parties have all through accepted and treated him as a Conciliation Officer in their industrial disputes there is no question of any prejudice being caused to any parties. Even the Company in its letter of December 21, 1976 made a representation to the Joint Labour Commissioner (Annexure 'B' to the petition) contending that application under section 33(2)(b) was not warranted regarding the dismissal of the concerned workmen, though obviously the representation was intended for the Conciliation Officer. The petition of the company under article 226 of the Constitution wherein the connected Rule was issued as also the memorandum of appeal before us describes P. C. Sen only as the Joint Labour Commissioner and not as the Conciliation Officer. The appellant company can therefore have no grievance on this point

13. Mr. Ginwalla next contended that the conferences held in the presence of the Labour Minister ceased to have the character of the conciliation proceedings as the Conciliation Officer had or could have no control or superintendence over the discussions and negotiations between the company and the workman in the presence of the Minister. He referred to the decision in (1) *Nagercoil Electric Supply Corporation v. Industrial Tribunal Trivandrum*, AIR 1953 T. C. 167 in which the Court held that an agreement come to between the employer and the workmen otherwise than in course of conciliation proceeding is not enforceable under the Industrial Disputes Act and cannot form the

foundation of grant of an interim relief by the Tribunal. On the facts of the case, the Court was of opinion that the settlement arrived at between the employer and workman in conference initiated by and in the presence of the Chief Minister could not be said to be one arrived at a conciliation proceeding under the Act as there was nothing to show that the Assistant Labour Commissioner was then functioning as the Conciliation Officer. Again in (2) *The Employees of the Caltex (India) Ltd. v. The Commissioner of Labour and Conciliation Officer*, AIR 1959 Madras 441 it was held that the Minister is not a Conciliation Officer and any settlement come to as a result of his good offices would not be a settlement arrived at in course of conciliation proceedings. These descisions have been strongly relied on by the appellant in support of its case that there was no conciliation proceedings as contemplated under the Act pending when the workman was dismissed from Service.

14. As contended by the learned Junior standing Counsel, it can not be said and the decisions cited above do not also lay down the proposition that mere presence of the Minister vitiates the conciliation proceeding. The presence of the Minister of the Government for settlement of industrial disputes in conciliation proceeding between the employer and his workmen in public interest is only to be expected in fitness of things and it will be an untenable situation in law or otherwise if the good offices of the Minister for settlement of industrial disputes, instead of helping the negotiations, will nullify, impede or frustrate such settlement. As however the settlement before the Conciliation Officer has a binding force, the procedural requirement must be strictly complied with. The Conciliation Officer accordingly, in such conferences, where the Minister is present to aid, advise and help the negotiations, must not abrogate his functions and duties but take such active part as required under subsection (2) of Section 12 of the Act, by way of investigation of dispute examination of all matters involving right settlement of the dispute and doing all such things as he may think fit for inducing the parties to come to a fair settlement thereof. In the discharge of such functions and duties by the Conciliation Officer, the good offices of the Minister will be a substantial assistance but the ultimate control and superintendence in such proceedings as required under Section 12(2) should always be with the Conciliation Officer. So that the mere presence of the Minister and his participation in the conciliation proceeding in aid of settlement, by themselves, will not vitiate the conciliation contemplated under the Industrial Disputes Act, 1947.

15. It appears from record P.C, Sen the Conciliation Officer has himself stated in his affidavit that meetings and conferences before the Labour Minister formed part of his attempt to induce the parties to come to fair and amicable settlement of the dispute. The meetings before the Labour Minister were conciliation proceedings held following the letter

of the Unions dated April 17, 1976 where the Conciliation Officer was mostly present, and it cannot be contended, as it appears to us, that his absence in some meetings would alter the character of the conciliation proceedings. It was denied that conciliation proceedings started in early February 1977 when the workmen resorted to demonstrations. The Conciliation Officer further denied that there was no proper report dated November 8, 1976 under Section 12(4) which, it has been said, was sent to the Government on November 17, 1976. There is no denial by the company to these averments made by the Conciliation Officer himself.

16. It may be mentioned here that under section 12(1) the Conciliation Officer has to hold conciliation proceeding whenever an industrial dispute exists or is apprehended and such proceedings shall be deemed to be concluded *inter alia*, when a report of the Conciliation Officer is received by the Government under section 12, Sub-section (4). In this case conferences were held following notice of the respondent No. 1 dated April 24, 1976 and the report of the Conciliation Officer under section 12(4) was received by the Government on November 17, 1976. It further appears that Government on June 10, 1976 appointed an Expert Committee to make a report on the question of computer which submitted its report on January 31, 1977. On the question of linkage of the question of computer with the charter of demands, there was agitation by the workmen culminating in settlement of February 10, 1977 when certain claims were settled leaving discussions in future at bipartite level on the charter of demands and other disputes. The Company unilaterally started the computer on March 1, 1977 and objection of the Co-ordination-Committee of the Unions, led to a tripartite settlement on March 31, 1977 of the charter of demands to be operative till March 31, 1979 subject to extension by mutual consent upto March 31, 1980.

17. The facts noted above indicate that the conciliation on the charter of demands was pending either upto November 17, 1976 when the report under section 12(4) was received by the Government or upto February 10 and March 31, 1977 when settlement was arrived at the tripartite level. In any event there is no escape from the position that the conciliation proceeding was pending on August 3, 1976 when the workman was dismissed for service.

18. The Conciliation Officer fixed the case for further hearing on the basis of his finding that provisions of section 33 (2) (b) are attracted in the instant case. It will be for the company now to justify the dismissal of the workman for misconduct on the principles fully set out in the decision in (3) *Delhi Cloth and General Mills Co. v. Ludh Budh Singh*, AIR 1972 SC 1031 either on the domestic enquiry or on additional evidence as may be adduced by it. Mr. Ginwalla submitted that the Conciliation Officer under section 11(3) has no power of the Court under

the Code of Civil Procedure to enforce the attendance of any person or examining him on oath which will seriously prejudice the Company's case. The Conciliation Officer under sub-section (4) of section 12 has the same power to call for and compel production of documents. It is not possible for this Court to afford the company any further right to compel attendances of witnesses in absence of statutory provision, and for the said reason, it is not possible to dispense with the statutory requirement of section 33(2) (b)—

19. It was contended by Mr. Dutt on behalf of the workmen that the company having itself filed the application under section 33(2) (b), it cannot be heard to say that such application was unnecessary on ground that the conciliation proceeding was not pending at the material date. Mr. Ginwalla referred to Article 213 Volume 11 of Halsbury's Laws of England (third edition) which lays down that the fact that the party applying for prohibition has himself initiated the proceedings in the inferior court is not material to the decision of the Court to grant or refuse the order. In (4) *Tata Iron & Steel Co. Ltd. v. D.R. Singh*, AIR 1966 SC 288, the Court held that the employer could make an application under section 33 without prejudice to his right that Section 33 did not apply. In view of the above position, the Company was entitled while filing the application for approval under Section 33 to urge before the Conciliation Officer in its application under section 33(2) (b) that no conciliation proceeding was pending at the material date and in consequence section 33(2)(b) was not attracted to the dismissal of the workman.

In the view we have taken the appeal fails and is dismissed. There will be no order for costs in the circumstances. All interim orders are vacated.

Mitra, C. J. : I agree.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Justice Mrs. Jyotinmoyee Nag

Decision : March 29, 1978

Ram Ch. Sinha

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Appellant

Versus

Sm. Protiva Dutta

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Respondent*

Limitation Act 1963, (36 of 1963) s. 5—Condensation of delay—Code of Civil Procedure Order 41, r. 3A, whether prohibits granting of stay of execution,—Exercise of Inherent power of court under s. 151 of the Code of Civil Procedure.

*Civil Rule No. 2940 (s) of 1977.

Appellant filed an application under s. 5 of the Limitation Act 1973 for condonation of delay along with memo of appeal. Rule was issued with ad-interim order of stay of execution till the hearing of the application. Respondent contended that order 41, rule 3A of the amended Code of Civil Procedure expressly prohibits grant of stay of execution of the decree so long as the matter is not heard under Order 41, rule 11 of the Code.

HELD: Section 151 of the Code of Civil Procedure provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the court to make necessary orders for the ends of justice. The inherent power has not been conferred upon the court, it is a power inherent in the court by virtue of its duty to do justice between the parties before it. Where there is no provision or remedy provided in the code itself to do justice, the inherent power can be exercised. Prohibition under order 41, rule 3A of C. P. C., is not an absolute prohibition. In the instant case the delay in filing the appeal has been properly explained, moreover execution Proceedings have been started and unless stay is granted of that execution case the appeal will become infructuous and opportunity will be denied to the appellant to avail of the remedy to which he has a right under the Code of Civil Procedure. In the circumstances the delay is condoned and stay of execution is granted till the hearing under order 41 rule 11 of the Code of Civil Procedure.

Cases referred to :—

- (1) *Nainsingh v. Noonwar*, AIR 1970 SC 997
- (2) *Union of India v. Ram Charan* (deceased) through his legal representatives, AIR 1964 SC 215
- (3) *Mrs. Nandita Dhar v. Dr. Amalendra Sen*, Calcutta High Court notes 1977 p. 87
- (4) *Monoharlal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527

Ramapati Roy for the Appellant
Tarun Chatterjee for the Respondent

The judgment of the Court was as follows :—

This Rule was issued on the opposite party to show cause why the application for condonation of delay under section 5 of the Limitation Act filed along with the memo of appeal should not be allowed. While issuing the Rule Chittatosh Mukherjee J. issued an Ad-interim order of stay which was made effective till the hearing of the present application under section 5 of the Limitation Act. A condition was imposed upon the petitioner and that condition, I learn from the learned Advocate for the petitioner has been complied with.

2. Now, the question is whether the ad-interim order of stay should be continued till the admission of the second appeal. The

learned Advocate appearing for the opposite party submits that under the amended Code of Civil Procedure by virtue of order 41 rule 3A. I have no power to grant stay of execution of the decree so long as the matter is not heard out under order 41 rule 11 of the Code of Civil Procedure and as there is an express prohibition in the Code itself, rule 3A of Order 41. It is true that reading the provisions of order 41 rule 3A of the Code of Civil Procedure, the procedure to be adopted is that stay of execution of the decree against which the appeal is filed should not be granted until the appeal itself is admitted under order 41 rule 11 of the Code of Civil Procedure. Would this provision of the Code limit my powers u/s. 151 of the Code of Civil Procedure to grant ad-interim stay if the facts and circumstances of a particular case necessitate for ends of justice ?

3. Mr. Chatterjee appearing for the opposite party has placed several decisions before me to substantiate his contention that when there is any express provision in the Code. I cannot exercise my inherent power under section 151 of the code contrary to that provision. Reference may be made in this connection to the case (1) *Nainsingh v. Noonwar* AIR 1970 SC 997 at page 999. Therein it has been held that the court cannot make use of section 151 CPC where a party had his remedy provided elsewhere in the Code and neglected to avail himself of the same. In the facts and circumstances of that case where a remedy was available to the party by way of appeal under Order 43 of the Code of Civil Procedure, that remedy being not availed of by the party concerned the inherent power could not be exercised.

4. The next case is (2) *Union of India v. Ram Charan (deceased) through his legal representatives*, AIR 1964 SC 215. There also the power under section 151 was sought to be exercised where the remedy was by way of an application under Order 22 rules 4 and 9 of the Code of Civil Procedure. It was held that the power under section 151 could not be exercised when there is a specific provision in the Code itself for getting the remedy. The third case relied upon is (3) *Mrs. Namita Dhar v. Dr. Amalendu Sen*, Calcutta High Notes, 1977 P. 87. In this case the plaintiff opposite party instituted a money suit against the defendant petitioner. The petitioner had filed a written statement. Thereafter on the application of the opposite party the court directed the petitioner to make discovery of documents and the petitioner made the discovery. Upon another application made by the opposite party for further discovery the court directed the petitioner to make further discovery. The petitioner filed to comply with this direction. Thereupon the court rejected the written statement suo motu and fixed the suit for ex-parte hearing. The petitioner filed an application under section 151 of the Code of Civil procedure for review of the order rejecting the written statement. This application was rejected and the petitioner obtained a rule against the said

order of rejection. As the impugned order is appealable, the order could not be challenged under section 151 of the Code and hence under order 11 rule 21 no revisional application could be preferred against it. In that case the petitioner did not come up to the High Court after the order striking out the written statement was made. He filed an application under section 151 of the Code which was held to be completely misconceived and it was held that the court could not exercise inherent power to give remedy to the petitioner in that case.

5. In the case (4) *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527, it has been held that since section 151 of the Code itself provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the court to make orders necessary for the ends of justice." In the face of such a clear statement it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the court ; it is a power inherent in the court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognises the existence of the inherent power of the court, there is no question of implying any powers outside the limit of the Code. Now as the provisions of the Code are not exhaustive for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation between the parties and consequently for providing the procedure for them. Therefore, where there is no provision or remedy provided in the Code itself to do justice, the inherent power can be exercised. In this case it is true that there is prohibition under order 41 rule 3A C.P.C. but then that prohibition cannot be construed as an absolute prohibition, because cases may arise where it will be doing injustice to deny the stay of the execution of the decree appealed against. In the instant case I find that the delay in filing the appeal has been properly explained and moreover execution proceedings being Title Execution Case No. 17 of 1977 have been started and unless stay is granted of that execution case, the appeal will become infructuous and opportunity will be denied to the petitioner to avail of the remedy to which he has a right under the Code of Civil Procedure. Accordingly, I condone the delay in filing the appeal and order that the memo of appeal be registered if it is otherwise in form and in the meantime until it is heard under Order 41 of Rule 11 of the Code of Civil Procedure, stay is granted of the Title Execution Cases No. 17 of 1977.

The Rule is accordingly made absolute. There will be no order as to costs.

N. C. S.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Salil Kumar Datta

Decision : September 15, 1978

Eyachhin Ali Naskar and Another Petitioners

Versus

Golap Gazi Respondent*

West Bengal Land Reforms Act, 1955-(10 of 1956) sec. 2 cl. (2), (6) and (10), Sec. 8—Whether application for pre-emption maintainable—What is Agricultural land—West Bengal Estates Acquisition Act, 1953.

Petitioners purchased 4 decimal of land of plot No. 249 on February 15, 1975. O.P. had purchased 1½ decimal of land on December 21, 1959. O. P.'s application for pre-emption was rejected by the learned Munsif on the ground that he had not purchased the land. Appellate court held that O. P. had purchased a portion of the land and that he was entitled to pre-empt and the pre-emption was allowed. Petitioners then obtained a Rule and submitted that the application under sec. 8 of the Land Reforms Act 1955 was not maintainable on the ground that the holding was not an agricultural holding but was bastu or homestead land. O. P. contended that in view of the definition of "agricultural land" in the West Bengal Estate Acquisition Act 1953 and West Bengal Land Reforms Act 1955, the homestead is deemed to be agricultural land and accordingly application under sec. 8 of the Land Reforms Act was maintainable.

HELD: Under sec. 2 cl (10) of the West Bengal Land Reforms Act, 1955, raiyat has been defined as a person who holds land for purpose of agriculture. When a raiyat has also homestead in and as part of his holding, in such a case a homestead will be included in such land. In the instant case where the holding is recorded as bastu and the non-agricultural user is also evident from the revisional record of rights then the land cannot be treated as land to which the provisions of the Land Reforms Act will be applicable, as the Act applies to agricultural lands only. The Rule is made absolute.

Cases referred to :—

- (1) *Ansuresha Dutta v. Diptimoy Pal and another*, 70 CWN 1079
- (2) *Misri Show v. Belur Nikunjamoyee Gadar Institution and others*, 1978 (1) CLJ 532
- (3) *Baburam Roy v. Mohendra Nath Samanta*, (1904) 8 CWN 454
- (4) *Nirshi Dhoabin v. Dr. Sudhir Kumar Mukherjee*, AIR 1969 SC 864

Bikash Ranjan Mondal for the Petitioners
Bhupendra Kumar Panda, Mrinal Kanti Roy and
C. K. Maity for the Respondent.

*Civil Revision Case No. 2253 of 1975.

The judgment of the Court was as follows :—

This rule is directed against and appellate order allowing an application for pre-emption made under Section 8 of the West Bengal Land Reforms Act, 1955. The impugned order was in reversal of the order of the learned Munsif dated November 15, 1975 dismissing the Misc. Case No. 42 of 1975 arising out of the said pre-emption proceedings.

2. The petitioners who are the pre-emptees, purchased the 4 decimals of land of plot no. 249, khatian no. 29 of mouza Makrampur, P.S. Sonarpur, District 24-Parganas by a conveyance dated February 15, 1975. The pre-emptor opposite party become a co-sharer of the land in respect of $.1\frac{1}{2}$ decimals of land by virtue of his purchase dated December 21, 1959. It may be mentioned here that the connected jama as recorded in R. S. Khatian No. 29 comprises only of dag No. 249 which is recorded as bastu having an area of .5 decimals. The application for pre-emption was rejected by the learned Munsif on the ground that in his evidence the pre-emptor stated that he did not purchase any part of the plot measuring .5 decimals obviously on a misunderstanding. Accordingly, it was held, he never became a co-sharer so that his application under section 8 was not maintainable in law.

3. Before the appellate court the main contention was about the genuineness of the kobala dated December 21, 1959 whereby the pre-emptor opposite party purchased a portion of the dag of the jama. It was held that by the kobala of December 21, 1959 the opposite party became a co-sharer of the holding and as such he was entitled to pre-empt the disputed property. In this view the application was held maintainable and the pre-emption was accordingly allowed.

4. In this Rule Mr. Mondal, learned Advocate appearing for the petitioners submitted that the application under section 8 of the Land Reforms Act, 1955 was not maintainable on the ground that the holding was not an agricultural holding. He referred to the revisional record of right wherein the tenancy has been recorded as raiyati dakhalsatta bisista and the nature of the land has been described as bastu in respect of the single dag of the jama with two huts standing thereon.

5. It must be stated that, though in the petition of objection to pre-emption there is a reference that the pre-emption is not available against bastu land, the trial in the courts below did not proceed on that basis. Even so, the question at issue involves point of law on the basis of facts which are not really in dispute. I think the petitioner can be permitted to urge the point in the form raised in this Court.

6. Mr. Mondal referred to a decision in (1) *Ansureskha Dutta v. Diptimay Pal and another*, 70 CWN 1079 in which it was held that a dakhalkar is not, and cannot be, a raiyat and plainly he is a non-agricultural tenant. The position was considered in (2) *Misri Show v. Belur Nikunjamoyee Gadar Institution & Ors.* 1978 (1) CLJ 532. It was noted in

that case that a long series of decisions reaffirmed the principle that the nature of the original tenancy and not the character of the parcel included in the sub-tenancy would determine whether the sub-tenancy was to be Governed by the Bengal Tenancy Act or by the Transfer of Property Act. This has been the position since the decision in (3) *Baburam Roy v. Mohendra Nath Samanta* (1904) 8 CWN 454 and in effect reaffirmed in (4) *Nirshi Dhubin v. Dr. Sudhir Kumar Mukherjee*, AIR 1969 SC 864 as stare decisis.

7. Under the West Bengal Estates Acquisition Act, 1953 as was also noted in the above decision, there was a change in the legal position. Under Section 2(b) the expression of the Act, "agricultural land" means land ordinarily used for purposes of agriculture or horticulture and includes such land, notwithstanding that it may be lying fallow for the time being. Under clause (j) the expression "non-agricultural land means land other than agricultural land or other than land comprised in a forest. It is thus obvious that the nature of the holding has to be determined with reference to the user of its land or lands under the said Act. Section 2(6) of the West Bengal Land Reforms Act defines "holding" as the land or lands held by a raiyat and treated as a unit for assessment of revenue. Under clause (7) of Section 2 of the same Act "land" in the Act means agricultural land other than land comprised in a tea garden which is retained under sub-section (3) of section 6 of the West Bengal Estates Acquisition Act, 1953 and includes homesteads. This definition of land was given retrospective effect by West Bengal Act 18 of 1965 in place of words "land" means agricultural land and includes homesteads and later on by West Bengal Act 12 of 1972 words "but does not include tank" was added thereto with effect from February 12, 1972. Explanations to clause (7) of section 2 of the West Bengal Land Reforms Act provides that homestead shall have the same meaning as in the West Bengal Estates Acquisition Act, 1953 and under the West Bengal Estates Acquisition Act, 1953 homestead has also been defined as dwelling house together with courtyard, compound, garden etc. annexed to or appertaining to such dwelling house.

8. Relying on these provisions Mr. Panda, learned Advocate for the opposite party contended that in view of the definition "agricultural land", the homestead is also to be deemed agricultural land and accordingly the application under Section 8 under the Land Reforms Act was maintainable in law.

9. Under section 2 clause (10) of the West Bengal Land Reforms Act, raiyat has been defined as a person who holds land for purpose of agriculture. When a raiyat, who holds land only for the purpose of agriculture, may also have homestead in, and, as a part of his holding in such case it seems a homestead will be included in such land. In a case where as here the holding is recorded as bastu and the non-agricultural user is also evident as appearing from the revisional record of rights wherein

it has been stated that there are two huts standing thereon, the land cannot be treated as land to which the provisions of the Land Reforms Act will be applicable, as the Act applies to agricultural lands only. Under section 8 of the Land Reforms Act if a portion or share of a holding of a raiyat is transferred to any person other than a co-sharer in the holding, it is liable to be pre-empted under certain conditions by a co-sharer raiyat or by a raiyat possessing land adjoining such holding. The right of pre-emption is thus confined to portion or share of a holding of the raiyat and not to any other kind of holding. In this state of affairs it is obvious that the holding in question cannot be said to be a holding held by a raiyat for which pre-emption under section 8 of the Land Reforms Act is available.

10. In the view I have taken the Rule succeeds and is made absolute. The orders of the Courts below are set aside and the case is sent back to the learned Munsif for disposal in accordance with law and the observations indicated above.

There will be no order as to costs. Let the records be sent down at once.

P. R.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice Bimalendra Nath Maitra

Decision : February 14, 1978

Sri Shankar Khan and others Petitioners
Versus

Sri Kalipada Roy and others Respondents*
West Bengal Land Reforms Act 1955 (10 of 1956), secs. 18(1), 18(1)(b), 18(2), 19B and 21(3)—Jurisdiction of Civil Court to refer to Bhagchas Officer any dispute as to the right of Bargadar.

Plaintiff petitioner instituted the suit for declaration of title, for declaration that O. P. no. 1 was his bargadar and for an order that the order of J.L.R.O. was without jurisdiction. The Munsif considered the objection of O. P. no. 1 and made a reference to the Bhagchas Officer in accordance with the provision of sec. 21(3) of the West Bengal Land Reforms Act, 1955. Against this order plaintiff filed this application and contended that the defendant had filed an application under sec. 19B before J. L. R. O. claiming Barga right to the disputed land and an order was passed against the plaintiff by the J. L. R. O. Plaintiff contended that since there was a previous adjudication between the parties by J. L. R. O. the Civil Court has no jurisdiction to make a further reference to the Bhagchas Officer on the same point.

HELD : • *Section 18(2) of the West Bengal Land Reforms Act 1955 lays down that if in deciding any dispute referred to in sub-sec. (1) or otherwise*

**Civil Rule No. 926 of 1975.*

any question arises as to whether a person is a bargadar or not, such question shall be determined by the officer or authority mentioned in sub-sec. (1). Section 18(1)(b) of the Act says that every dispute between the bargadar and the person whose land he cultivates in respect of termination of cultivation by a bargadar shall be determined by the Bhagchas Officer or the competent authority. In cases where the officers or authorities under sec. 18(1) had finally adjudicated the question whether a persons was a bargadar or not, any question within the meaning of sec. 21(3) cannot again arise in a subsequently instituted suit or proceeding in a civil or criminal court. In this case it has already been decided by J. L. R. O. that defendant no. 1 is a bargadar. The same point cannot again be referred by the civil court to Bhagchas Officer in accordance with sec. 21(3) of the Act. The Munsif's action was wrong and he should determine the suit according to law.

Cases referred to :—

(1) *Sudarshan Ghosh v. Janakinath Pandit*, AIR 1976 Cal. 252 : 1976 (1) CLJ 415

(2) *Chapala Bala Adhikary v. Manoranjan Das and others*, 1975 (2) CLJ 447

Tarun Chatterjee for petitioners
Samaresh Banerjee for opposite party no. 1

The judgment of the Court was as follows :—

The petitioner is the plaintiff. He instituted the suit in question against the defendant opposite parties for a declaration of title to the disputed land and for a further declaration that opposite party no. 1 was not his bargadar and also for an order that the order of the Junior Land Reforms Officer dated the 28th of September 1973 was without jurisdiction.

2. The learned Munsif considered the objection raised by the defendant, opposite party no. 1, and made a reference to the Bhagchas Officer in accordance with the provisions of section 21(3) of the West Bengal Land Reforms Act, 1955. Being aggrieved by this order, the plaintiff filed the present application.

3. It has been contended on behalf of the petitioner that the order in question cannot be sustained. The principal defendant filed a collusive application under section 19B of West Bengal Act X of 1956 before the J.L.R.O claiming barga right to the disputed land and an illegal order was passed against him by the J.L.R.O. It has thus been contended that since there was a previous adjudication between the parties by the J.L.R.O. in regard to the disputed land, the Civil Court had no business to make a further reference to the Bhagchas Officer on the same point. The cases of (1) *Sudarshan Ghosh v. Janakinath Pandit*, AIR 1976 Cal. 252 : 1976 (1) CLJ 415, and (2) *Chapala Bala Adhikary v. Manoranjan Das and others.*, 1975 (2) CLJ 447 have been referred to.

4. The learned Advocate appearing on behalf of the opposite party No. 1 has contended that the Division Bench decision in *Sudarshan*

Ghosh v. Janakinath Pandit (Supra) was on a different point and the Single Bench decision in the case of *Chapala Bala Adhikary v. Manoranjan Das and others*, (supra) is also not authority for the proposition advanced on behalf of the petitioner because the observation made in that case is merely an obiter.

5. It may be briefly indicated that *Sudarshan Ghosh v. Janakinath Pandit*, was decided before section 18(2) was amended in June 1975. In that view of the matter it is not necessary to consider the decision of that case. A very important amendment was made at that time and that matter will be briefly referred to subsequently.

6. Section 18(2) of the Act clearly lays down that if in deciding any dispute referred to in sub-section (1) or otherwise any question arises as to whether a person is a bargadar or not and to whom the share of the produce is deliverable, such question shall be determined by the officer or authority mentioned in Sub-section (1). The expression "or otherwise" was first introduced in that sub-section by the amending Act of 1974 and thereby the scope of the section was very much widened. It is true that the learned Advocate appearing on behalf of the respondents opposite party laid emphasis on the point that the previous decision of the J.L.R.O turned on the provisions of section 19B of the Act because the question of restoration of land to the bargadar arose. But it may be pointed out that section 18(1)(b) of the Act says that every dispute between the bargadar and a person whose land he cultivates in respect of termination of cultivation by a bargadar shall be determined by the Bhagchas Officer or the competent authority. In view of the amendment made to sub-section (2) of section 18 in 1974, the question of termination will thus also be covered and in such a case reference may be made by the Civil Court to the Bhagchas Officer within the meaning of section 21(3) of the Act. This question was considered in detail by a Single Bench of this Court in *Chapala Bala Adhikary's case*. It appears from page 454 of that report that there may be also cases where the officers or authorities under section 18(1) had finally adjudicated the question whether a person was a bargadar or not and in that event any question within the meaning of section 21(3) cannot again arise in a subsequently instituted suit or proceeding in a civil or criminal court.

7. It has already been determined by J.L.R.O. that defendant No. 1 was a bargadar. So in view of the frame of the suit, namely, that the declaration made by the J.L.R.O. that the defendant opposite party No. 1 was not a bargadar, could not again be referred by the Civil Court to the Bhagchas Officer in accordance with the provisions of section 21(3) of the Act. In that view of the matter the contention put forward on behalf of the opposite party No. 1 cannot be sustained. It is therefore held that the learned Munsif acted illegally in making such a reference and that he should determine the suit according to law.

8. The Rule is therefore made absolute. The order appealed against is hereby set aside. There will be no order as to costs.

9. The observations made in the Judgment are without prejudice to the rights and contentions of the parties to this Rule.

Let the records go down as early as possible.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Sankar Prasad Mitra, Chief Justice, and

Mr Justice Salil Kumar Datta

Decision : July 25, 1978

Director of Entry Taxes & Anr. Petitioners

Versus

M/s. Sricol Chemicals Industries Private Ltd. ...Respondent*

Taxes on Entry of Goods into the Calcutta Metropolitan Area Act, 1972—Interpretation of Statutes—Restriction of technical meaning of technical terms used in a statute—When necessary.

Various chemical compounds popularly known in trade and commerce as “Dyes Intermediate and required for manufacture of dyes were taxed by the Entry Tax Authorities under Serial No. 49(a) of Class VI of the Schedule to the Taxes on Entry of Goods into the Calcutta Metropolitan Area Act, 1971. The goods referred to in Serial No. 49(a) were “Aromatic chemicals, attars, scents, scented materials and perfumery of all kinds”. The assessee challenged the orders of assessment by a writ petition. The assessing authorities contended that the technical connotation of the terms “Aromatic Compounds” embraced the goods imported by the assessee. The assessee contended that even if that were so, the technical meaning should be restricted in view of the fact that the imported goods formed part of a class of goods which were popularly known in the trade as “Dyes Intermediate” which had not been included in the schedule of taxable goods. The trial Judge upheld the contention of the assessee and set aside the orders of assessment. The respondents appealed.

HELD : *The appeal should be dismissed. The taxed chemicals appertained to a distinct class of chemicals which were popularly known in the world of trade and commerce as “Dyes Intermediate”. They had been dealt with as a distinct category in the “Import Trade Control Policy”, a publication of the Ministry of Trade and Supply, Government of India and other relevant publications. There was also internal evidence in the Statute itself indicating that the general words “Aromatic Chemicals” were not intended to include “Dyes Intermediate”. The technical meaning and scope of technical terms used in a statute has to be given a restricted*

*Appeal from original order no. 98 of 1973.

meaning where it appears that such restricted meaning was intended by the Legislature.

Arun Prokash Chatterjee, Amal Datta and S. L. Saroff .. for Appellants
Sanjoy Bhattacharjee and Miss Aparna Dutta ... for Respondent

The judgment of the Court was as follows :—

Mitra, C. J. : This is an appeal from a judgment of Ghose, J. delivered on October 4, 1972 in an application under Article 226 of the Constitution, *inter alia*, for the issue of a Writ in the nature of Mandamus commanding the respondents before the trial Court who are the appellants before us to cancel or rescind certain orders of assessment of entry tax. A Writ in the nature of certiorari was also asked for directing that the purported assessments be quashed. Ghose, J. has made the Rule absolute except in regard to some of the assessments. His Lordships directed the respondents (the appellants before us) to refund to the petitioner (the respondent before us) a total sum of Rs. 55,540.30.

2. The respondent imports various raw materials from foreign countries for the purpose of manufacturing dyes. The respondent holds a licence issued by the Central Government for import of the following chemical compounds :-

- | | |
|-------------------------------|--------------------------|
| 1. Sodium Naphthionate | 18. Ortho Anisidine. |
| 2. Acetic Anhydride. | 19. Para Anisidine. |
| 3. Ortho Toluidine. | 20. Para Toluidine. |
| 4. Benzidine Dihydrochloride. | 21. J. Acid Urea. |
| 5. Di-nitro Chlorobenzene. | 22. J. Acid. |
| 6. 2:5 Dichloronitro benzene. | 23. Chicago Acid. |
| 7. 4-Chloro-C-Nitrotoluene. | 24. Gama Acid. |
| 8. Ortho Chloronitrobenzene. | 25. N. W. Acid. |
| 9. Para Nitrochlorobenzene. | 26. Ortho Toluindine. |
| 10. Aniline Oil. | 27. Aceto Acetic Esten. |
| 11. Netanitro Aniline | 28. Beta Oryuaphthene |
| 12. Ortho Nitro Toluene. | Acid. |
| 13. Para-Nitro Toluene. | 29. Armstrong Acid. |
| 14. Para-Nitro Aniline. | 30. Rhoduline Acid. |
| 15. Alpha Naphthylamine. | 31. Dehydrothiox P-Tol- |
| 16. Beta Naphthol. | uidine Disulphonic Acid. |
| 17. H. Acid. | 32. Aceto Acetenilide. |

3. The respondent's case is that these chemical compounds are raw materials popularly known as "Dyes Intermediates" required for manufacturing various types of dyes. Under the Taxes on Entry of Goods into the Calcutta Metropolitan Area Act, 1972 (West Bengal Act V of 1972) taxes are levied and collected on the entry of specified goods. Sub-section (1) of section 6 in Chapter III of this Act lays down :-

“6(1). Save as otherwise provided in this Chapter, there shall be levied and collected, for the purpose of Act a tax on the entry of every specified goods into the Calcutta Metropolitan Area (for consumption, use or sale therein) from any place outside that area, at such rate, not exceeding the rate, specified in the corresponding entry in column 3 of the Schedule, as the State Government may, by notification, specify.”

4. The respondent from time to time was clearing the aforesaid chemical compounds from the Port of Calcutta and bringing them into the Metropolitan Area. The respondent made a declaration in Form 4 prescribed under the said Act before the Calcutta Jetty Collection office where it was required to pay entry tax in respect of all specified goods before bringing them into the Metropolitan Area. From annexure ‘A’ to the petition before the trial court it appeared that the respondent was made to pay entry tax, *inter alia*, on the above goods under item 49(a) in class VI of the Schedule to the Act. Item 49(a) reads thus :

Serial No.	Specified goods	Rates of taxes
49(a)	Aromatic chemicals, attars, scents scented materials, perfumery of all kinds.	2 per cent ad valorem

5. In the trial court an affidavit of Nani Gopal Mondal affirmed on the 22nd August, 1972, was used. Nani Gopal Mandal on the date of affidavit, was the Zonal officer-in-Charge of Entry Tax Check Post within the Port of Calcutta including the Jetty Collection Office. He has annexed to his affidavit a copy of an opinion given by an Assistant Professor of the Chemistry Department of the Presidency College, Calcutta. The Assistant Professor has stated that the aforesaid chemical compounds except H. Acid and J. Acid Urea are aromatic chemicals. With regard to the two items, namely, H. Acid and J. Acid Urea he was unable to express any opinion and stated that the chemical nomenclature of these items was necessary. From Rogers’ “Manual of Industrial Chemistry”, 6th Edition, Vol. 2 at pages 1080 and 1081 items 347 and 353 respectively we find that H. Acid and J. Acid Urea are Napthalene Derivates. H. Acid is used as “Azodyes and Acetyl H. Acid” and J. Acid Urea is used as “Dyes”.

6. Various authorities were relied on by Counsel for the parties before us to enable us to appreciate what precisely was meant by “Aromatic Chemicals”. It would be enough for us to refer to “Organic Chemistry 2nd Edition by Morrison and Boyd both Professors of Chemistry of the New York University. At page 311 of this book it is, *inter alia*, stated :

“Chemists have found it useful to divide all organic compounds into two broad classes—*Aliphatic* Compounds and *Aromatic* Compounds. The original meanings of the words “Aliphatic” (*Fatty*) and “Aromatic” (*Fragrant*) no longer have any significance,

"Aliphatic Compounds are open-chain compounds and those cyclic compounds that resemble the open-chain compounds. The families we have studied so far-Alkanes, Alkenes, Alkynes and their cyclic analogs-are all members of the Aliphatic class.

"*Aromatic Compounds are benzene and Compounds that resemble Benzene in chemical behavior.* Aromatic properties are those properties of benzene that distinguish it from Aliphatic Hydrocarbons. Some compounds that possess Aromatic properties have structures that seem to differ considerably from the structure of benzene; actually, however, there is a basic similarity in electronic configuration....."

7. In Organic Chemistry, therefore, originally fatty Compound were known as Aliphatic Compounds and fragrant Compounds were known as Aromatic Compounds; but with the advance of science this broad distinction could not be maintained. But there is yet a difference between Aliphatic Compounds and Aromatic Compounds and that distinction has been pointed out in the excerpts we have quoted above. Aliphatic Compounds are open chain Compounds and those cyclic Compounds that resemble open-chain compounds. Aromatic Compounds are benzene and Compounds that resemble benzene in Chemical behaviour.

8. We would have discussed at this judgment the views of other authorities as well. But the respondent's Counsel has not ultimately disputed before us that all the chemicals we have to deal with in the present case were aromatic Compounds or chemicals. But his point is that these compounds are understood in the trade and industry in a popular sense. Popularly they are called "Dyes Intermediates."

9. Our problem, therefore, in the present appeal, is to determine (1) whether the compounds in question though aromatic Chemicals are popularly known in the trade as "Dyes Intermediates" and (2) whether they can be subjected to entry tax under item 49(a) of the schedule to the West Bengal Act V of 1972.

10. In support of his contentions that the trade both in India and outside knows these chemicals as "Dyes Intermediates", learned counsel for the respondent placed before us a publication by a German firm called "Schimmel & Co., Aktiengesellschaft, Militzbe, Leipzig." We were told that this firm was a well known firm of chemists with an international repute. In its Jubilee edition of 1929 it published a "Short Manual of the most important Odoriferous chemicals and Aromatics their properties, use and application", revised by Dr. Fred Winter. In this manual there is no mention of any of the compounds we have to consider in the instant appeal. This shows, says learned counsel, that in the trade they are not known as aromatic chemicals at all.

11. The German firm's publication throws some light on the subject no doubt. But it cannot be accepted as a convincing authority to prove

that popularly the relevant chemicals are known as "Dyes Intermediaries."

12. Mr. Sanjoy Bhattacharyya, learned Counsel for the respondent then relied on a publication of the Government of India, Ministry of Foreign Trade and Supply on "Import Trade Control Policy" for the year April, 1969-March 1970 Volume 1. There are two appendices to this publication, namely Appendix 24-Annexure List III and Appendix 28-List IV. The First list is a list of "Dyes Intermediates permitted on restricted basis to actual users". The second list is the "List of materials which will be allowed import against licences issued for import of Aromatic chemicals". These two lists have been printed separately at pages 274 to 275 and 300 to 304 respectively of the Union Government's publication.

13. This publication by the Union Ministry of Foreign Trade and Supply appears to us to be of considerable significance for purposes of this appeal. In allowing import of chemicals from abroad the Government of India makes a distinction between "Dyes Intermediates" and "Aromatic Chemicals". In the trade, therefore, all Aromatic chemicals are not treated as "Aromatic Chemicals". Some of them are grouped as "Dyes Intermediates" although from the point of view of organic chemistry they may be aromatic chemicals. This is a distinction which the Central Government has made and we cannot ignore this distinction in disposing of this appeal or in construing the said item 49(a) in the Schedule to the West Bengal Act V of 1972 which is an Act relating to trade and commerce. In Riegel's "Industrial Chemistry", 5th Edition at page 580 there is a discussion in Chapter 27 on the manufacture of "Dye Intermediates" Riegel, *inter alia* says :

"The group of Synthetic Compounds called intermediates is the starting point for the manufacture of dyes ; they form the raw materials for the dye industry ; to put it still another way the intermediates are the foundations of the dye construction. The name is certainly appropriate, for they are the intermediate Compounds between benzene, naphthalene and anthracene, on the one hand, and the brilliant and varied dyes on the other."

14. Dyes intermediates, therefore, have a distinctive connotation well understood by those who deal in these substances. In fact, in the Sechail (Chemical) list of Indian Standards Published upto 30th September, 1977, the I.S.I. (Indian Standards Institution) has given an entirely separate list of "Dyes Intermediates" at pages 12 and 13. This is an indication that "Dye Intermediates" is a heading under which some chemicals are named and understood by the Indian Standards Institution which operates in our country to maintain the purity and standards of various articles of trade.

15. The West Bengal Act received the assent of the Governor and was first published in the Calcutta Gazette Extraordinary on the 4th May,

1972. It is to be presumed that the State Legislature knew that the Union Government in granting licences for import of Chemicals observed a distinction between "Dyes Intermediates" and "Aromatic Chemicals". But in spite of that the State Legislature did not specifically include "Dyes Intermediates" either in the said item 49(a) or in any other item of the Schedule to the West Bengal Act V of 1972. In the schedule itself the intention of the legislature is explicit in certain other items. We shall give just a few instances. Item 17 in Class IV-A is "Mineral oils of all sorts-". What these mineral oils are have thereafter been specified and what is to be excluded has also been expressly stated.

16. Similarly, item 8(b) in class I is "Gur of all sorts". Item 37 in class V is "Glass, glassware, chinaware, enamelware all kinds of crockery used for construction or decoration of buildings". Item 47(a) in Class VI-A is "Beads of all sorts. Item 48(f) in class VI-B is "Glass, glassware bottles, chinaware, earthen ware, porcelainware (excluding articles used for construction or decoration of buildings)". Item 72 in class X is "Chinaware, porcelainware electric insulators not otherwise provided". Item 74 is "Dyes, indigo, tans, all colouring matter including printing pastes, inks." Item 79 in class X is "Photographic chemicals, films and mounts".

17. Upon reading the various items, we have referred to, we are of opinion, that in specifying articles to be taxed, the legislature has been meticulous. It has taxed mineral oils of all sorts. It has taxed Gur of all sorts. It has taxed Beads of all sorts. It has taxed all kinds of crockery and different varieties of Dyes and all colouring matters; but it has not taxed "Aromatic Chemicals of all kinds" or "Aromatic Chemicals including Dyes Intermediates". Incidentally, we may point out that there is a tax on photographic chemicals and two of these photographic chemicals, namely, p-Aminophenol and p-Aminophenol hydrochloride, are Benzene Derivatives, that is, aromatic chemicals and are used, amongst others, as photographic developer as well as dyes; vide Rogers' Manual of Industrial Chemistry," 6th Edition, Vol. 2, page 1054, items 164 and 165.

18. For the reasons discussed above it seems to us that if the legislature intended to tax what the Government of India had described as "Dyes Intermediates" in its Import Trade Control Policy or what the trades understands as "Dyes Intermediates", it would have specifically included "Dyes Intermediates" either in item 49(a) or in some other item of the schedule to the West Bengal Act V of 1972. We make this comment, particularly in view of the care the legislature has taken in describing various other items in the said schedule.

19. Our attention has been drawn to the Central Government's aforesaid publication as well as to other authorities to support the respondent's contention that, the chemicals. We are concerned with, in this appeal, are "Dyes Intermediates". We are not referring to these authorities in this

judgment inasmuch as the learned standing counsel appearing for the appellant does not dispute that these chemicals are used as "Dyes Intermediates" but contends that they are "Aromatic Chemicals" all the same.

20. On the materials placed before us, therefore, we have reached the conclusion that the chemicals above-mentioned are "Aromatic Chemicals" but in the world of trade commerce and industry they are known as "Dyes Intermediates". The questions whether the popular meaning should prevail over the scientific meaning in construing item 49(a) in class VI-C of the schedule to the West Bengal Act V of 1972.

21. In cross "Statutory Interpretation", published by Butterworths, London, in 1976, at page 57 it is stated ; "Nothing need be said at this stage about the distinction between an ordinary and technical meaning, but something must be said about "fringe meaning" and the cognate problem of the restrictions to be placed on the interpretation of general words. Problems of "fringe meaning" are sometimes spoken of as "problems of the penumbra", the point being that, in the case of a great many words, there is no doubt about the hard core of their meanings, but different views may well be taken on the question whether the word is applicable to things or situations outside that hard core. No-one doubts that a chair is furniture, but what about linoleum ? A fully equipped motor car is certainly a vehicle, but what if the engine and wheels are removed ? Is a bicycle a carriage ? Different minds may take different views concerning the answer to these and countless similar questions. In a great many cases the answer will of course vary according to the context in which the problem arises and the courts will be guided by the object of the legislation they are considering, but very frequently the judge can do little more than say that a line has to be drawn somewhere and that he has decided to draw it beyond or short of the facts of the case before him.

22. In the instant appeal we are faced with a problem similar to the problem of fringe meaning or the problem of the penumbra. The chemicals which have been sought to be taxed are 'Aromatic Chemicals'. But amongst these Aromatic Chemicals there is a group of chemicals which is known in the trade as "Dyes Intermediates," The object of the Act under which the tax has been imposed is "to provide for the levy of taxes on entry of goods of *certain kinds* into the Calcutta *Metropolitan* Area for consumption, use or sale therein, and for matters connected therewith or incidental thereto." What are the 'certain kinds' of goods which are to be taxed have been specifically and exhaustively described in the schedule to the Act. In view of the distinction which, before the Act came into force, the Government of India had made in its Import Trade Control Policy between "Dyes Intermediates" and "Aromatic Chemicals", it seems to us that "Dyes Intermediates" is a "certain" kind of goods which would have been mentioned specifically in the schedule

to the West Bengal Act V of 1972, if the legislature intended at the date of the enactment to impose an entry tax on them. The Court has to draw the line somewhere in the context of the object of the legislation and other relevant factors. On the materials made available to us by learned counsel for the parties in the instant appeal we cannot but hold that the legislature did not intend to tax "Dyes Intermediates".

23. We intend now to refer Crawford's "The Construction of Statutes" published in 1940. At pages 319 to 322, Article 187 runs thus :

"Technical terms in a Statute, ... , must be accorded their technical meaning, unless the Statute indicates that the legislature intended otherwise. Moreover, there is a presumption that they have been used in their technical sense. Nevertheless, where it appears that a contrary meaning was intended by the legislature, the common or non-technical meaning, should be applied, or the technical meaning enlarged or restricted so as to effectuate the obvious purpose of the legislature. This rule is applicable to technical legal terms, words having a special sense at common law, military terms, and words of arts. And terms borrowed from a foreign law should be given the meaning they have in the foreign law. Similarly, where the words incorporated in a Statute have acquired a specific meaning by virtue of judicial interpretation, such meaning should be accepted, in the absence of some indication of a contrary legislative intention. And the same is proved with reference to commercial or trade names used in a tariff act to designate certain kinds of goods, where such names have acquired a wellknown meaning in trade and commerce. But where a word has both a technical and popular meaning no matter in what sort of a statute it appears--the latter meaning will prevail over former, in the absence of any indication that the word was used in its technical sense."

24. Here is a case in which the chemicals we are concerned with have a technical and a popular meaning. Technically they are aromatic chemicals ; but popularly they are known as "Dyes intermediates". There is no indication in the Statute that "Dyes Intermediates" are to be understood in the technical sense. Whenever the Statute wanted to give such indication it had expressly said so, e.g., mineral oils of all sorts (item No. 17), Gur of all sorts (Item No. 8(b), Beads of all sorts (item No. 47(a) or all kinds of crockery used for construction or decoration of buildings (item No. 37). In the absence of any indication therefore, in the Statute itself "Dyes Intermediates" appear to be outside the purview of the Statute as in cases like these the popular meaning would prevail over the technical meaning.

25. Lord Esher, M. R. has made a similar observation in *Unwin v. Hanson*, (1891) 2 Q.B. 115 at page 119 Lord Esher, M. R.

has said ; "If the Act, is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

26. The above observation of Lord Esher, M. R. are not strictly applicable to the facts of this case ; but it lays down a sound principle of construction of Statutes. We may take judicial notice of the fact that various chemicals are imported by us from abroad. These include "Aromatic Chemicals." The imported chemicals enter the Calcutta Metropolitan Area. It is on record that the Government of India while granting licences for import of "Aromatic Chemicals", adheres to a distinction or difference between some chemicals which are allowed to be imported as "Aromatic Chemicals" and certain other chemicals which are allowed to be imported as "Dyes Intermediates" even though they are Benzene derivatives or compounds that resemble Benzene in chemical behaviour. In these circumstances, while interpreting item 49(a) in the Schedule to the West Bengal Act V of 1972, we are not inclined to include "Dyes Intermediates" within the scope of "Aromatic Chemicals" in the absence of express words to that effect.

27. We agree with the conclusion of the learned trial Judge that the goods imported as "Dyes Intermediates" are not known in the trade as "Aromatic Chemicals" and do not fall within item 49(a) of the schedule to the Taxes on Entry of Goods into the Calcutta Metropolitan Area Act, 1972.

28. In the result, this appeal is dismissed. Interim orders, if any, are vacated. We make no order as to costs.

Dutta, J. : I agree.

S.P.M.

[CIVIL REVISIONAL JURISDICTION]

Before Mr. Justice N. C. Mukherji

Decision : November 8, 1978

Dukha Haran Mukherji ...

... **Petitioner**

Versus

Sm. Tara Sundari Dassi & Ors. ...

... **Opposite partis***

Decree, executability of which is a nullity – Executing Court, power of, to go behind the decree under section 47 of the Code of Civil Procedure.

Plaintiff opposite party filed a suit for ejectment against the petitioner

*C. R. No. 2974 of 1977.

on the ground of reasonable requirement for own use and occupation, The trial Court decreed the suit. The tenant preferred an appeal before the High Court pending which clause (f) of sub-section (i) of section 13 of the West Bengal Premises Tenancy Act, 1956 was substituted by clauses (f) and (ff). The High Court framed two additional issues for a proper determination of the case and sent the case to the trial court keeping the appeal pending. The trial court sent the case back to the High Court after recording its findings on the additional issues. The High Court set aside the judgment and decree of the trial court and dismissed the suit. The landlords preferred a Letters Patent Appeal. The Division Bench, while agreeing with the finding of the Trial Court that the plaintiffs' requirement may be substantially satisfied by evicting the tenant from only one room, decreed the suit in full by dismissing the decree passed by the High Court in appeal. In the execution proceeding, the tenant filed an objection under section 47 of the Code of Civil Procedure stating inter alia, that the order of the Letters Patent Bench required clarification and that the decree was not executable. The said application having been rejected the tenant-petitioner moved the High Court in revision.

HELD : The decree passed by the Letters Patent Bench being in violation of the mandatory provisions of section 13(4) of the West Bengal Premises Tenancy Act, 1956 is a nullity and as such is not executable.

In case of a decree being a nullity the Executing Court in an objection under section 47 of the Code of Civil Procedure can hold that the decree is not executable.

Cases referred to :—

- (1) *Bahadur Singh & Anr. v. Muni Subrat Dass & Anr.* 1969 (2) SCR 432
- (2) *Sm. Kaushalya Devi & Ors v. K. L. Bansal*, AIR 1970 SC 838
- (3) *Ferozi Lal Jain v. Man Mal & anr*, AIR 1970 SC 794
- (4) *Chandan Mall Bapna v. Abdul Gani Meah*, AIR 1976 Gauhati 54
- (5) *Bhavan Vaja & ors. v. Solanki Hanuji Khodaji Mansang & anr.*, AIR 1972 SC 1371
- (6) *K K. Chari v. R. M. Seshadri*, AIR 1973 SC 1311
- (7) *Topanmal Chhotamal v. M/s. Kundomal Gangaram & ors.*, AIR 1960 SC 388
- (8) *Hira Lal Patni v. Sri Kali Nath*, AIR 1962 SC 199
- (9) *Ittyavia Mathai v. Varkey Varkey & anr*, AIR 1964 SC 907
- (10) *Erandol Taluka Gramodyog, Utpadak Sahakari Society, Erandol v. M/s. Sunil Waste Corpn.* AIR 1971 Bom 91

Saktinath Mukherji and Deba Prasad Mukherji ... for Petitioner
Bankim Chandra Dutta and Partha Dutta ... for Opposite parties

The judgment of the Court was as follows :—

This Rule arises on an application under section 115 of the Code of Civil Procedure and is directed against order dated 30th August, 1977, passed by Shri K. N. Mukherji, Judge, 10th Bench, City Civil Court, Calcutta, in Miscellaneous Case No. 253 of 1976 arising out of Ejectment Execution Case No. 242 of 1975. The Opposite Parties as landlords instituted Ejectment Suit No. 284, of 1964 before the 10th Bench, City Civil Court, Calcutta against the petitioner for eviction from the premises in suit, that is, 3 rooms on the first floor and a kitchen on the ground floor of premises No. 61A, Madhu Roy Lane on the ground that they reasonably require the same for their own use and occupation. The learned Judge decreed the suit. Being aggrieved, the petitioner preferred an appeal being F.A. 581 of 1967 before this court. During the pendency of the appeal Clause (f) of sub-section (1) of section 13 of the West Bengal Premises Tenancy Act was substituted by Clauses (f) and (ff). The said new Clause (ff) applied to the aforesaid appeal and it became necessary to determine whether or not the opposite parties were in possession of any reasonable suitable accommodation. Chittatosh Mukherji, J. who heard the appeal, was pleased to frame two additional issues for a proper determination of the case and to send the case to the trial court keeping the appeal pending before his Lordship. The two additional issues were to the following effect:—1) Are the plaintiffs already in possession of any reasonably suitable accommodation, or not? 2) Whether the requirement of the plaintiff may be substantially satisfied by ejecting the defendant from a part only of the premises in terms of sub-section (4) of section 13 of the West Bengal Premises Tenancy Act? The trial court was directed to make findings on the above two issues after giving the parties opportunities to adduce further evidence. The trial court after taking additional evidence passed an order on 20th March, 1972 to the effect that the plaintiffs' requirement, being only of one bed room, may substantially be satisfied by evicting the defendant from one of the 3 bed rooms in his occupation on the first floor and the learned Judge held accordingly. The learned Judge after making his findings as above on the two issues sent his findings to this Court. Thereafter, the appeal was again heard by Chittatosh Mukherji, J. who, however, set aside the judgment and decree of the trial court and dismissed the suit. Being aggrieved, the opposite parties preferred Letters Patent Appeal No. 36 of 1974. S. K. Mukherji and M. N. Roy, JJ. allowed the Letters Patent Appeal. Their Lordships agreed with the finding of the trial court that the requirement of plaintiffs 1, 2 and 3 can be satisfied from the existing accommodation, but the plaintiff No. 4 required only one room. Their Lordships also agreed with the finding of the trial court that in the circumstances the plaintiffs' requirement may substantially be satisfied by evicting the defendant from one of the 3 rooms. Even though their Lordships very clearly

found so in their judgment. In the concluding portion it was stated that the judgment and decree of the appellate court are set aside and those of the learned trial court are restored. It may be mentioned that the trial court decreed the suit in full, though their Lordships in the Letters Patent Appeal found that if the opposite parties got one room their requirement will be satisfied and that can be done by partially evicting the petitioner, yet the effect of the concluding portion of the judgment is that the opposite parties got a full decree. After obtaining such a decree the opposite parties started Execution Case. The petitioner filed an application under Sec. 47 of the Code and hence, the Miscellaneous Case. In the objection under Sec. 47 of the Code it was stated that some subsequent events happened which clearly go to show that the plaintiff No. 4 is no more in requirement of any accommodation in the suit premises. It was also stated in the said application that the decree passed by the High Court simply stated that the judgment and decree of the trial court were restored. The order of this court in Letters Patent Appeal required clarification. In view of the findings of the learned Judges, the opposite parties cannot get a decree for recovery of possession of the entire premises. After the disposal of the Letters Patent Appeal, the petitioner filed an application in this Court for making a note of the subsequent events. The said application was ultimately taken up for hearing by R. Bhattacharyya and Jana, JJ, who were pleased to allow the petitioner to withdraw the said application and to file an application for review. Ultimately an application for review was filed. The said application was taken up for hearing by M. N. Roy, J. who dismissed the application as the same was barred by limitation. His Lordship however, did not enter into the merits of the application. The learned Judge, City Civil Court, dismissed the application under Sec. 47 of the Code holding that this Court restored the judgment and decree of the trial court which passed a full decree in favour of the opposite parties. An application for review was filed and the same was dismissed by this Court. That being so, the learned Judge was of opinion that the Execution of the decree cannot be effectively challenged by the judgment-debtor. Being aggrieved by the aforesaid order the petitioner has come up to this court.

2. Mr. Sakti Nath Mukherji, learned Advocate appearing on behalf of the petitioner, contends that the decree passed by the Letters Patent Bench is a nullity. In this connection, it is further submitted that the decree is not executable being contrary to the provisions of the West Bengal Premises Tenancy Act. Mr. Mukherji contends that section 13(4) of the West Bengal Premises Tenancy Act provides that where the landlord requires the premises on any of the grounds mentioned in clause (f) or clause (ff) of sub-section (1) and the court is of opinion that such requirement may be substantially satisfied by ejecting the tenant or the sub-tenant from a part only of the premises and allowing the tenant or the

sub-tenant to continue in occupation of the rest, then, if the tenant or the sub-tenant agrees to such occupation, the court is to pass such decree accordingly and fix the proportionate rent for the portion remaining in the occupation of the tenant or the sub-tenant. Mr. Mukherji submits that section 13(4) is really a proviso to section 13(1)(f) and (ff) and the provisions of section 13(4) are mandatory. Mr. Mukherji submits that the Letters Patent Bench in very clear terms agreed with the findings of the trial court that the plaintiff Nos. 1, 2 and 3 did not require any portion of the suit premises and that their requirement could be substantially met by the existing accommodation. Their Lordships also agreed with the finding of the trial court that the plaintiff No. 4 required only one room of the suit premises. Their Lordships also agreed with the further finding of the trial court that plaintiff No. 4's requirement can be satisfied by evicting the defendant from one of the rooms of the suit premises. It may be mentioned that Chittatosh Mukherji, J. did not agree with the finding of the trial court that plaintiff No. 4 required one room in the suit premises and dismissed the suit. The Letters Patent Bench was, therefore, correct in setting aside the judgment and decree of Chittatosh Mukherji, J. But, after setting aside the judgment and decree of Chittatosh Mukherji, J. the Letters Patent Bench restored the judgment and decree of the trial court. Mr. Mukherji submits that the Letters Patent Bench omitted to note that the trial court passed a decree for eviction in respect of the entire suit premises. According to Mr. Mukherji the Letters Patent Bench never meant to pass a full decree in favour of the plaintiff. The Letters Patent Bench in very plain and clear words found that it was only plaintiff No. 4 who required one room in respect of the suit premises. Letters Patent Bench also agreed with the finding of the trial court that the requirement of plaintiff No. 4 can be satisfied by evicting the defendant from one of the rooms of the suit premises. In view of such finding it was incumbent on the Letters Patent Bench to pass a decree for partial eviction in respect of one of the rooms of the suit premises. But, that has not been done in this case. Instead, the decree of the trial court has been restored and as a result, the plaintiffs have started execution of the said decree. If this decree is allowed to be executed then the defendant will be evicted from the entire suit premises. It may be mentioned that after the suit was sent back, the trial court found that the plaintiffs required only one room and the Letters Patent Bench agreed with such finding. In such circumstances, Mr. Mukherji submits that the decree passed by the Letters Patent Bench being in violation of the provisions of section 13(4) of the West Bengal Premises Tenancy Act is a nullity and such a decree cannot be executed being contrary to the provisions of the Act. To fortify his argument, Mr. Mukherji cites before me several decisions. He first refers to a decision reported in (1) 1969(2) SCR 432 (*Bahadur Singh & Anr. v. Muni Subrat Dass & Anr.*), In this case, a decree was passed for recovery

of possession of a premises without being satisfied that a ground of eviction existed. It was held that the decree was a nullity and could not be executed. Mr. Mukherji next refers to a decision reported in (2) AIR 1970 SC 838 (*Sm. Kaushalya Devi and others v. K. L. Bansal*). In this case, it was held that "the decree passed on the basis of an award was in contravention of section 13(1) of the Delhi and Ajmir Rent Control Act because the court had passed the decree in terms of the award without satisfying himself that the ground of eviction existed. Accordingly the decree in so far as it directed delivery of possession of the premises to the landlord was a nullity and could not be executed." Mr. Mukherji next refers to a decision reported in (3) AIR 1970 Supreme Court 794 (*Ferozi Lal Jain v. Man Mal & anr*). In this case it has been held that "the jurisdiction of the court to pass a decree for recovery of possession of any premises depends upon its satisfaction that one or more of the grounds mentioned in section 13(1) of the Delhi and Ajmir Rent Control Act have been proved. Mr. Mukherji next refers to a decision reported in (4) AIR 1976 Gauhati 54 (*Chandan Mall Bapna v. Abdul Gani Meah*). It has been laid down in this case that "if a decree is not in conformity with or in violation of certain mandatory provisions of law or barred by certain statutory provisions it cannot be executed and if an objection is taken by the judgment debtor to that effect the executing court will have to decide under section 47 of the Code." Mr. Mukherji very much relied on this decision and contends that in the present case also the decree that has been passed by the Letters Patent Bench is in violation of the mandatory provisions of section 13(4) of the West Bengal Premises Tenancy Act. An objection has been taken under section 47 of the Code and if it be found that the decree is a nullity being in contravention of the provisions of the West Bengal Premises Tenancy Act then it must be held that the decree is non-executable. Mr. Mukherji next relies on a decision reported in (5) AIR 1972 Supreme Court 1371 (*Bhavan Vaja and others v. Solanki Hanuji Khodaji Mansang and another*). In this case, the court had to deal with the question of powers of an executing court in disposing of an application under section 47 of the Code. It has been held that "for construing a decree an executing court can and in appropriate cases ought to take into consideration the pleadings as well as the proceedings leading upto the decree". Relying on this decision Mr. Mukherji contends that reading the judgment of the Letters Patent Bench it becomes very clear that their Lordships did not agree with the findings of Chittatosh Mukherji, J, that even the plaintiff No. 4 did not require any room in the suit premises. But their Lordships agreed with the findings of the trial court that plaintiff Nos. 1, 2 and 3 did not require any room and only plaintiff No. 4 required one room and that plaintiff No. 4's requirement could be sufficiently met by evicting the defendant from a portion of the suit

premises. This being the conclusive findings of the Letters Patent Bench the decree which has been passed by the Letters Patent Bench cannot, by any stretch of imagination, be said to follow from the judgment and that being so, Mr. Mukherji contends that such a decree is a nullity. The last case referred to by Mr. Mukherji has been reported in (6) AIR 1973 Supreme Court 1311 (*K. K. Chari v. R. M. Seshadri*). In this case, it has been held that "even when a decree is passed on the basis of a compromise the court must be satisfied that one or other ground of eviction exists. If without such satisfaction a decree for eviction is passed then such a decree must be considered as a nullity".

3. Mr. Bankim Chandra Dutta, learned Advocate, appearing on behalf of the opposite parties, contends that the objection which has been raised in the application under section 47 was rightly rejected by the executing court as the executing court was bound to execute the decree which was passed by the Letters Patent Bench. The executing court, Mr. Dutta submits, has no authority to question the correctness of the decree passed by the Letters Patent Bench. Even assuming that there has been an error in the passing of the decree of the Letters Patent Bench that can only be corrected by the Bench itself, or by the higher court. The executing court cannot come to a finding that the decree which has been passed by the Letters Patent Bench is not a correct decree and that some other decree ought to have been passed by the said Bench. Mr. Dutta also submits that in the present case, the trial court never passed a decree for partial eviction. At the first instance, the trial court decreed the suit in full. There was an appeal. The case was sent back on remand by Chittatosh Mukherji, J. after his Lordship framed two issues. After remand, the trial court found that the plaintiffs have no other reasonably suitable accommodation and that the plaintiff No. 4 required one room in the suit premises and his requirement could be satisfied by partial eviction. Those findings were forwarded to this court. Chittatosh Mukherji, J. did not agree with the finding of the trial court that plaintiff No. 4 required one room and as such dismissed the suit. The plaintiffs preferred an appeal to the Letters Patent Bench which set aside the judgment and decree passed by Chittatosh Mukherji, J. and restored the judgment and decree of the trial court. In such circumstances, it cannot be said that the decree passed by the Letters Patent Bench is a nullity and that the same is not executable. In the circumstances as stated above Mr. Dutta submits that the executing court has no jurisdiction to question the legality and validity of the decree and the executing court has no other option but to pass an order for executive the decree. Mr. Dutta in support of his contention first referred to a decision reported in (7) AIR 1960 SC 388 (*Topanmal Chhotamal v. Kundomal Gangram and others*). In this case their Lordships

found "it was manifest from the pleadings and the judgment that though a personal decree was sought against defendants 2 to 6 the court expressly refused to give that relief and expressly confined it to the assets of the firm in the hands of the partners". It was held that the executing court could not go behind the decree. Mr. Dutta next submits that only lack of jurisdiction of a court can be challenged in an execution proceeding. In support of his contention Mr. Dutta refers to (8) AIR 1962 SC 199 (*Hira Lal Patni v. Sri Kali Nath*). Mr. Dutta next contends that if it be found that the court has jurisdiction over the subject matter and the parties then even if the decision be wrong it cannot be said that such a decision is a nullity. In support of his submission Mr. Dutta seeks reliance from a decision reported in (9) AIR 1964 SC 907 (*Itiyavia Mathai v. Varkey Vathekey and another*). In this connection, Mr. Dutta further submits that the executing court cannot go behind the decree even if it is erroneous in law, or on facts. Mr. Dutta next submits that in such circumstances the real point is to see whether the court could have passed the order. But the facts of the present case, it may be noted, are different. In the present case, nobody challenges the orders of the Letters Patent Bench in setting aside the judgment and decree of Chittafoshi Mukherji, J. But, the difficulty was created by passing an order that the judgment and decree of the trial court be restored. As has already been stated, the Letters Patent Bench never intended to pass a decree for eviction in respect of the entire premises. The Letters Patent Bench very clearly found that the plaintiffs' requirement could be satisfied if the plaintiffs got only one room out of the suit premises. Mr. Dutta very much relies on a decision reported in (10) AIR 1971 Bombay 91 (*Erandol Taluka Gramodyog Utpadak Sahakari Society, Erandol v. M/s. Sunil Waste Corpn.*) In this case, a suit was filed without prior service of a notice as required under the law. It was held "that is a defect which affects the maintainability of the suit and not the inherent jurisdiction of the court. If a decree is passed in such a suit such decree was open to challenge in appeal. But if no appeal is preferred such a decree must be held to be binding between the parties and this point cannot be agitated in execution proceeding as the executing court cannot go behind the decree".

4. As has already been indicated the Letters Patent Bench found as follows:- On the other question of partial eviction it appears that the defendant agreed to vacate one of the bed rooms in his occupation of the first floor in favour of the plaintiffs if it was found that the plaintiffs' requirement would be satisfied by such partial eviction. We find that the learned trial court has found that the requirement of the plaintiff Nos. 1, 2 and 3 would be satisfied from the accommodation which was available and plaintiff No. 4 only requires one bed room. I uphold the findings of the learned trial court on that issue." After findings as above, the Letters Patent Bench ordered as follows:- "In view of the above and respectfully

agreeing with the reasons as given hereinafter by S. K. Mukherjee, J. I am of opinion that the learned appellate court was not right in allowing the appeal of the tenant defendant and dismissing the suit. We, thus, set aside the judgment and decree of the appellate court as made in F. A. No. 581 of 1967 and confirm the judgment and decree as was made by the learned trial court in Ejectment Suit No. 284 of 1964. This Letters Patent appeal thus succeeds and is allowed. ... On a careful reading of the judgment I have no hesitation to say that the decree that has been passed by the Letters Patent Bench does not follow from the judgment passed by the said Bench. Their Lordships never intended to pass a decree in respect of the entire suit premises as their Lordships themselves found that the plaintiff Nos. 1, 2 and 3 did not require any accommodation and that the plaintiff No. 4 required only one bed room. In such circumstances, I am of the opinion that the Letters Patent Bench really intended to pass a decree for partial eviction. But, unfortunately that has not been done. After hearing the learned Advocates at length and considering the decisions referred to by them and carefully considering the facts and circumstances of the case, I am of the opinion that the decree passed by the Letters Patent Bench is a nullity and is inexecutable.

5. In the result, the application succeeds and the Rule is made absolute. The order passed by the learned Judge is set aside. The application filed by the petitioner under section 47 of the Code of Civil Procedure is allowed and the execution case is dismissed. There will be no order for costs in this Rule.

K. M. G.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice G. N. Ray

Decision : September 20, 1978

Tripura Charan Chatterjee

Petitioner

Versus

The State of West Bengal and others

Respondents*

**Civil Services (Classification, Control and Appeal) Rules 1930—
West Bengal Civil Services (Classification, Control and Appeal) Rules
1971—Joint and/or common trial—Legality of enquiry proceeding.**

Petitioner had been appointed by the government in 1946 as an assistant engineer and he was promoted to the post of Executive Engineer in 1959. In 1970, government issued to him a chargesheet on the charges of dishonestly calling for tender, for passing bill for nearly Rs. 9000/- and for misappropriation of public money. On the basis of the chargesheet, there were enquiry proceedings against the petitioner along

*C. R. No. 15443 (w) of 1976

with two other government officers for various lapses. On the basis of the enquiry report, petitioner was asked to show cause why he should not be dismissed. Upon considering petitioner's reply and on the recommendation of the Public service commission, the authorities did not pass an order of dismissal but passed the impugned order of compulsory retirement of the petitioner. Petitioner moved a writ petition challenging the order of compulsory retirement and contended (1) that the enquiry report showed that a joint and common trial was held in respect of the petitioner along with two other government officers. Such joint trial was completely without jurisdiction since there was no provision for joint trial in the Civil Services (Classification, Control and Appeal) Rules 1930, (2) that no permission or sanction of the governor or any prescribed authority was obtained for joint trial as required under the West Bengal Civil Services (Classification, Control and Appeal) Rules 1971. He also urged that there was no application of mind by the punishing authority. Respondent No. 1 contended that there was no common trial but there was analogous trial with consent of parties and that the authority did apply its mind.

HELD : *The enquiry officer, as a matter of fact made a joint and/or common trial in respect of all the delinquent officers and it cannot be contended that the case of each of the delinquent officers was dealt with independently. The joint and/or common trial was held without any sanction from the governor or any other appropriate authority as mentioned in the West Bengal Civil Services (Classification, Control and Appeal) Rules 1971. In view of the Violation of statutory provisions, the joint and/or common trial was illegal. Further, the petitioner was highly prejudiced by such joint and/or common trial because the statements of the other delinquent officers were relied on against the petitioner without giving him any opportunity to examine the said delinquent officers and to controvert the statements made by them. It is quite evident that the enquiry report in respect of all the charges is not maintainable in law and actions taken on basis of such enquiry report, namely, issue of a second show cause notice and the passing of the impugned order of compulsory retirement, are also not maintainable and the Rule must succeed on that score alone. The Rule is made absolute.*

Cases referred to :—

- (1) *Union of India v. Premchand*, 1973 (2) SLR 344
- (2) *State of Orissa v. Bidya Bhusan Mahapatra*, AIR 1963 SC 779
- (3) *Railways Board, New Delhi v. Niranjan Singh*, AIR 1969 SC 967
- (4) *State of Assam & Anr. v. Bimal Kumar Pandit*, AIR (1963) SC 1612
- (5) *Barium Chemicals v. A. I. Rana*, AIR 1972 SC 591
- (6) *Divisional Personnel Officer, South Eastern Railway v. T. R. Chatterlappan*, AIR 1975 SC 2216

Saktinath Mukherjee, Deba Prosad Mukherjee, Madhusudan

Banerjee and Mrs. Smriti Kana Mukherjee... *for petitioner*

N. N. Gupta, (G. P.) and Samarjit Gupta *for State*

Jamini Kumar Banerjee and Sujit Kumar Luik... for respondents nos. 2 and 3

The judgment of the Court was as follows :—

In the instant Rule the order of compulsory retirement of the petitioner made by the Government of West Bengal, Irrigation and Waterways Department dated 20th of September, 1976 being annexure 'A' to the supplementary affidavit of the petitioner is under challenge. The petitioner also prays for a writ in the nature of Certiorari for quashing the charge-sheet issued against the petitioner, the inquiry report made on the basis of such chargesheet and the second show-cause notice issued on the basis of the said chargesheet and the finding of the inquiring officer. The short facts of the case is that the petitioner joined the then Government of Bengal as Assistant Engineer some time in June 1946 and in 1959 the petitioner was promoted to the post of Executive Engineer in the Irrigation and Water-ways Department of the Government of West Bengal. On 24th of October, 1970, a chargesheet was issued to the petitioner on the following charges :—

Charge No. 1

"That Shri Chatterjee dishonestly called for tenders by issuing tender notice No. 8 of 1967-68, dated the 4th July, 1967 for Annual Repair Works to Desh Khal during 1967-68 and had appointed Sarvasri Lakshman Chandra Bhuniyan, Contractor, for digging 2 lac. cft. of earth in the said Khal falling within Salehpur Mouza and Manikpat Mouza at Rs. 5, 221.25 P. and H.P. Goswami to dig similar quantity of earth in the said Desh Khal falling within the Dongol Mouza for a like amount of money without any sanction, authority or order of the Government and without any fund having been allotted for the purpose, knowing full well that re-excavation work in the said Khal had already been undertaken and was being executed by the Agri-Irrigation Wing, Central Division, Burdwan under the Agriculture and Community Development Department :

Charge No. 2.

That Shri Chatterjee dishonestly passed the bill for Rs. 8,922/- submitted on the 29th March, 1968 for re-excavation work at Manikpat and Dongol Mouzas by Shri Lakshman Chandra Bhuniyan on false and fabricated Government records and reports prepared to his knowledge in collusion with Shri Anil Kumar Ghatak, Temporary Sub-Assistant Engineer, Irrigation and Waterways Directorate, who is at present holding charge of the Sibgunge Section under the Hooghly Irrigation Division of the said Directorate, and Sri Ashutosh Mukherjee, permanent Assistant Engineer and Officiating Executive Engineer, Irrigation and Waterways Directorate, Government of West Bengal, now holding charge of the Berhampore

Irrigation Division and got it paid to Shri Bhuiyan, although he knew at all relevant times that no earthwork was done by contractor Lakshman Chandra Bhuiyan at Desh Khal at Manikpat Mouza in the same way as he knew that Shri Bhuiyan had no authority to do any earthwork at Dongol Mouza which was allotted by him to contractor, Sri H.P. Goswami, the letter of cancellation of Shri Goswami's contract having been issued from his office as late as 30.3.68 (vide Memo No. 1079 (1) to the Assistant Engineer, Arambagh Irrigation Sub-Division.

Charge No. 3.

That Shri Chatterjee in combination with the said Shri Ashutosh Mukherjee, Ex-Assistant Engineer, and Shri Lakshman Chandra Bhuiyan Contractor, dishonestly misappropriated public money to the tune of Rs. 8922/- as between himself and his associate hereinbefore mentioned, which act on his part was improper and unbecoming of his position as an Executive Engineer and derogatory to the prestige of the Government ;”

2. It appears that on the basis of such charge-sheet, an inquiry proceeding was initiated against the petitioner. It further transpires that along with the petitioner, two other Government Officers were also charge-sheeted for various lapses made by them and the said officers were Shri Ashutosh Mukherjee, Assistant Engineer, Irrigation, and Waterways Department and Shri Anil Kumar Ghatak, Section Officer in the said Irrigation and Waterways Department in the Arambagh Sub-Division, It also appears that Shri J. C. Chakraborty was appointed as an Inquiring Officer to inquire into the charge-sheets levelled against the petitioner and the said two other officers. It will appear from the inquiry report that the departmental inquiry against the petitioner Shri Tripura Charan Chatterjee who was then Executive Engineer, Irrigation and Waterways Directorate Government of West Bengal, had been held analogously with the inquiries directed against the said Shri Ashutosh Mukherjee, Assistant Engineer and Shri Anil Kumar Ghatak, Sub-Assistant Engineer. It further transpires from the inquiry report that at the desire of the said officers and for the convenience of the parties, the departmental inquiry had been held analogously in respect of all the said three officers. A number of witnesses were examined in the said inquiry proceeding and it appears from the inquiry report that the statements of the said two other officers were also taken into consideration by the Inquiring Officer and in his inquiry report the said officer found that all the said charges had been proved. On the basis of the said inquiry report, a show-cause notice was issued to the petitioner, *inter alia*, stating therein that the findings of the Inquiring Officer appear to be just and reasonable and in the said show-cause memo the petitioner was asked to show cause why he should not be dismissed from service. The petitioner thereafter showed a very long cause, *inter*

alia, stating therein that the said inquiry report was incorrect in material particulars and the Inquiring Officer was absolutely biased and proceeded on mere surmise and conjecture and basic facts required to be proved by the department concerned to substantiate the charges had not been proved at all but nonetheless the petitioner was held guilty of all the said charges. In the second show cause notice, the petitioner specifically stated that he was completely innocent and he had no knowledge whatsoever that the excavation of the khal in question was not to be done by his department but some other department of the Government was entrusted to do the said job. In the said long representation showing cause, the petitioner pointed out various irregularities committed by the Inquiring Officer and submitted that under such circumstances the inquiry report should not be accepted at all and the petitioner should be exonerated from all the charges levelled against him unjustly and without any reasonable basis. It however, appears that the Disciplinary Authority ultimately did not pass an order of dismissal against the petitioner but on the basis of the recommendation made by the Public Service Commission of the State passed the impugned order of compulsory retirement of the petitioner from service and as aforesaid, in the instant Rule the said order of compulsory retirement is under challenge.

3. Mr. Saktinath Mukherjee, the learned Counsel appearing for the petitioner contended that it would be quite apparent and evident from the inquiry report that a joint and common trial was held in respect of the petitioner along with the said two other Government Officers. But such joint trial was completely without jurisdiction. Mr. Mukherjee contended that the disciplinary proceeding was initiated under the Civil Services (Classification, Control and Appeal) Rules, 1930 and there was no provisions under the said Civil Services (Classification, Control and Appeal) Rules 1930 for such joint or common and analogous trial and as such, the entire proceeding before the Inquiring Officer was without jurisdiction and no action was permissible, on the basis of such inquiry report. Mr. Mukherjee contended that the chargesheet, annexure 'D' to the writ petition refers to the old rules and as aforesaid, there was no provision for joint trial in the said Civil Services (Classification, Control and Appeal) Rules, 1930. Mr. Mukherjee next contended that during the continuance of the departmental proceeding, the West Bengal Civil Services (Classification, Control and Appeal) Rules 1971 came into force with effect from 1st of May, 1971 and the departmental proceeding against the petitioner continued upto 10th of November, 1971. Mr. Mukherjee submitted that in view of the provisions of Rule 9, particularly, the proviso to the said rule read with rule 25(1) including proviso to clause (B) of the West Bengal Civil Services (Classification, Control and Appeal) Rules, 1971 the said 1971 Rules will apply to the departmental proceeding pending at the commencement of the

said Civil Services (Classification, Control and Appeal) Rules, 1971 and Mr. Mukherjee fairly conceded that under such circumstances it was quite open to the respondents to obtain sanction either from the Governor or from any other authority referred to in the proviso to Rule 9 of the said Classification Control and Appeal Rules 1971 for common proceeding against the petitioner along with other delinquent officers. Mr. Mukherjee contended that admittedly in the instant case no such permission or sanction was obtained either from the Governor or from the prescribed authority for a common trial of the petitioner along with the said two other delinquent officers and as such, the inquiry proceeding was vitiated. Mr. Mukherjee further contended that it will appear from the inquiry report itself that at the desire of the petitioner and other delinquent officers and for the convenience of the parties the inquiry proceeding was held analogously so far as the petitioner and the said two other delinquent officers were concerned. Mr. Mukherjee contended that there cannot be estoppel against the Statute and even assuming that the petitioner agreed for such analogous trial there was no occasion on the part of the Inquiring Officer to proceed with a joint trial or a common trial without the sanction obtained from the Governor or any other authority referred to in the 1971 rules. Mr. Mukherjee further contended that on the face of the report of the Inquiring Officer it appears that the petitioner at the most desired for an analogous trial but the joint and/or common trial was not desired by the petitioner. Mr. Mukherjee contended that the jurisdiction of the Inquiring Officer in a departmental proceeding depended on the provisions of the said Classification Control and Appeal Rules, 1971 and no jurisdiction in contravention of the said Rules can be conferred on the Inquiring officer by any consent of the parties. For this contention, Mr. Mukherjee referred to the decision made in the case of (1) *Union of India v. Prem Chand* reported in 1973 (2) Services Law Report 344. In the said decision Rule 1710 of the Discipline and Appeal Rules for the Railway servant was under consideration and it was held in the said decision that there was inherent lack of jurisdiction in the joint Board of Inquiry and no amount of acquiescence or consent of the parties can confer jurisdiction on it which such Board of Inquiry did not possess. The Rajasthan High Court further held in the said decision that in such circumstances, the participation of the plaintiff in the inquiry will not preclude the plaintiff from challenging the jurisdiction of the Board of Inquiry.

4. Mr. Government Pleader, appearing for the respondents, however, contended that there was no joint or common trial in the instant case. The learned Government Pleader fairly conceded that if a joint and/or common trial was held then under the provisions of the West Bengal Civil Services (Classification, Control and Appeal) Rules, 1971 a

sanction from the authority referred to in the said Rules was required to be taken. But the learned Government Pleader contended that the facts and circumstances being common, an analogous trial was held in respect of all the three officers by consent of the parties and for the convenience of the parties. Such analogous trial, in the aforesaid facts and circumstances, was not made in breach of any statutory rule, and no exception can be taken in respect of such analogous departmental proceeding held in the instant case. Mr. Government Pleader further contended that as there was no statutory breach, the petitioner is also estopped from challenging the legality of such analogous trial in view of the fact that he consented for such analogous trial and had also participated in such trial.

5. The learned Government Pleader also contended in this connection that even if the findings in respect of one or two of the charges levelled against a delinquent officer are invalid for breach of statutory rules relating to departmental enquiry proceeding and/or for violation of the principles of natural justice, there should not be any interference by the writ court against the penalty imposed on the delinquent officer if the penalty in question could have been passed on the basis of other findings validly made in respect of the remaining charge or charges. For this proposition, the learned Government Pleader referred to a decision of the Supreme Court made in the case of (2) *State of Orissa v. Bidya Bhusan Mahapatra*, reported in AIR 1963 SC 779 and another decision of the Supreme Court made in the case of (3) *Railways Board, New Delhi v. Niranjan Singh*, reported in AIR 1969 SC page 967. It was held in *Bidya Bhusan Mahapatra's* case that the reasons which induced the punishing authority, if there had been an inquiry consistent with the prescribed rules are not justiceable. It was also held that if the order of dismissal may be supported on any finding as to substantial misdeamenour on which the punishment can be lawfully imposed, it is not for the court to consider whether the grounds alone would have weighed with the authority in dismissing the public servant. It was held that the court has no jurisdiction if the findings of the enquiry officer or Tribunal prima facie makes out a case of misdeamenour to direct the authority to reconsider the order because in respect of some of the findings but not all there had been some illegality. It was also held in *Niranjan Singh's* case that if the order of removal could be lawfully passed on sustainable charge, it is not for the court to consider whether that ground alone would have weighed with the authority in imposing the punishment in question. The aforesaid contention of the learned Government Pleader is therefore of substance and accordingly it is necessary to examine as to whether the penalty in question could have been passed on any of the sustainable charges. If the penalty imposed against the petitioner is permissible in law on the basis of the findings validly made in respect of any of the charges, it is immaterial if the findings made in

respect of some other charges had been vitiated because of violation of any statutory law relating to enquiry proceeding and/or violation of the principles of natural justice.

6. Mr. Mukherjee however contended that it was not a case of analogous trial but as a matter of fact, a common and/or joint trial was held so far as the petitioner and the said other two delinquent officers were concerned and the statements and/or records relating to other two officers were freely relied on by the Inquiring Officer for the purpose of making his finding in respect of each of the charges levelled against the petitioner. Mr. Mukherjee contended that the statements made by the other delinquent officers were relied on against the petitioner for basing the findings in respect of each of the charges although the said other delinquent officers were not cited as witnesses against the petitioner and they also did not depose against the petitioner and the petitioner was also neither supplied with the copies of their statements nor was he given any opportunity to examine the said persons. Mr. Mukherjee contended that in the facts and circumstances of the case, it cannot be contended that there was an analogous trial and there had not been any breach of the statutory provisions or the principles of natural justice. Mr. Mukherjee contended that the findings made in respect of all the three charges were vitiated and as such the penalty could not have been imposed on the basis of any of the sustainable charges.

7. So far as the charge No. 1 is concerned, Mr. Mukherjee referred to paragraph 14 of the inquiry report and contended that the defence cases of all the said three delinquent officers were taken into consideration by the Inquiring Officer for the purpose of making his finding relating to charge No. 1 levelled against the petitioner. Mr. Mukherjee also referred to paragraph 16 of the inquiry report and stated that the last ten lines of the said paragraph 16 will undoubtedly point out that a joint assessment was made by the Inquiring Officer in respect of all the three officers. Mr. Mukherjee also drew the attention of the Court to paragraph 18 of the inquiry report wherein also the reference of the petitioner and his subordinate officers namely, the other delinquents was made. Mr. Mukherjee also referred to paragraph 56 of the inquiry report and stated that the statement of the other delinquent officer, namely, Shri Ashutosh Mukherjee was relied on by the Inquiring Officer for making his finding against the petitioner relating to charge No. 1. Mr. Mukherjee drew the attention of the Court to the statement contained in the inquiry report in paragraph 56 to the following effect :

“Sixthly, the discrepancies in the defences advanced by the three officers proceeded against, also point to the conclusion that the defences are not bona fide.”

It was further held in the said paragraph 56 that :

"Sri Chatterjee's statement as to the alleged engagement of contractor Lakshman Bhuiyan runs directly counter to what Shri Mukherjee the Asstt. Engineer, says in his written statement of defence, Ext. 26. In the same way the Sectional Officer Shri Ghatak's statement, Ext. 27 goes against Shri Mukherjee's very materially on this particular point."

8. Mr. Mukherjee contended that it is thus quite apparent and evident that even the written statements filed by the other delinquent officers were freely relied on by the Inquiring Officer for the purpose of making finding against the petitioner so far as charge No. 1 is concerned and by no stretch of imagination it can be contended that it was not a case of joint trial but it was just a case of independent trial held against each of the three officers analogously by the consent of parties and for the convenience of the parties. Mr. Mukherjee also referred to paragraph 58 of the inquiry report wherein it was held :

"For such a batch of officers to stoop down to dishonesty and deceit for private gains and personal aggrandisement is but appropriate, and hence their hydra-headed defences themselves constitute yet another circumstances, and a strong circumstances at that, against them all, both individually and collectively".

9. Mr. Mukherjee also drew the attention of the Court to paragraph 62 of the inquiry report and submitted that it will appear from the said paragraph that all the three officers were considered jointly by the Inquiring Officer and on such consideration it was held that "between the three officers charged, and perhaps in collusion with contractor, Lakshman Ch. Bhuiyan who was more or less a namelender, the illegal actions were taken by all the said officers." Mr. Mukherjee also strongly relied on the statements contained in paragraph 64 of the inquiry report wherein it was held to the following effect :

"The circumstances stated above which are common to all the three cases before me, leave no room for doubt that they are incompatible with the innocence of any of the officers of the I & W. Deptt. with whom we are concerned in these proceedings, and also incapable of explanation upon any other reasonable hypothesis than that of their complicity in the offences charged, both individually collectively. I say this because the cumulative effect of the circumstances appearing as a whole against them all, is illustrative of their close partnership in the matter of misappropriating Govt. money to the extent of Rs. 9,000/- approximately. In other words there is in this group of cases a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with their innocence."

10. Mr. Mukherjee submitted that it will thus be quite clear that the Inquiring Officer assssed facts against the petitioner relating to charge No. 1 on the basis of the statements made by the other delinquent

officers and also on the basis of the complicity of the other officers and it cannot be contended that there was no joint trial and or common trial so far as charge No. 1 is concerned. So far as charge No. 2 against the petitioner is concerned. Mr. Mukherjee submitted that from paragraph 67 of the inquiry report it will appear that the Inquiring Officer also considered the cases of the other delinquent officers and made a common finding against all of them. Mr. Mukherjee contended that such rolling up of evidences and rolled up consideration of the cases of all the delinquent officers vitiated the inquiry proceeding and no action could be taken on the basis of such inquiry report. Mr. Mukherjee referred to paragraph 67 of the inquiry report and drew the attention of the Court to the statement made in the said paragraph to the effect :

“We have again got it from the Sectional Officer, Shri Ghatak, that the work contemplated by Ext. 13 could be completed just in 18 days’ time and that he is not in a position to say as to why the Executive Engineer extended the time for execution of the said work upto 16.5.68.”

There is also statement in the said paragraph to the following effect :

“Now it is admitted by Shri Mukherjee, the Asstt. Engineer as he then was, that he received a copy of the said letter only on 2.4.68. But strangely, the work concerned was finished according to the defence, by contractor Lakshman Ch. Bhuiyan even before 24.3.68.

The explanation offered by Shri Chatterjee, as we have already seen, is unacceptable.”

Mr. Mukherjee also referred to the statement made in paragraph 67 of the inquiry report wherein it was held :

“Suffice it to say, the defence of Shri Chatterjee, Shri Mukherjee and Shri Ghatak on the above point and the evidence given by each thereon, bristle with contradictions, that are simply irreconcilable.”

11. Referring to the said paragraph 67 Mr. Mukherjee contended that even in respect of charge No. 2 the Inquiring Officer proceeded against the petitioner on the basis of the statements made by other delinquent officers and the entire proceeding was conducted in such a manner as if there was a joint and or common trial and the contention of the learned Government Pleader that there was no joint and or common trial in the departmental inquiries against the three officers but all the three cases were independently inquired into but for the convenience of the parties and with the consent of the parties the said three inquiries were held analogously should not be accepted. So far as charge No. 3 is concerned. Mr. Mukherjee also submitted that relating to charge No. 3 the Inquiring Officer also rolled up the cases of all the three delinquent officers for the purpose of making his finding against

the petitioner. Mr. Mukherjee referred to paragraph 71 of the inquiry report wherein it was held :—

“Evidence as to these ingredients of a conspiracy are ingrained in the instant group of cases, and hence, I have no hesitation in saying that the principles of section 120A, I.P.C. and also of Section 10 of the Evidence Act are applicable to the facts and circumstances proved against the three officers proceeded against departmentally before this commission.”

Mr. Mukherjee also referred to paragraph 72 of the inquiry report wherein it was held to the following effect :—

“In the above view of the matter, the evidence and the circumstances proved by the prosecution, as we have seen earlier, lead to the inevitable conclusion that Shri Chatterjee in combination with his two subordinate officers stooped to dishonesty and succeeded in defrauding the Govt. of roughly Rs. 9000/- without executing the work which they fraudulently professed to.”

Mr. Mukherjee contended that in the aforesaid facts and circumstances of the case it cannot be contended by any stretch of imagination that there was no joint and/or common trial in respect of the petitioner and the said two other delinquent officers but all the said delinquent officers were tried independently but such independent inquiries against each of them were only held analogously for the sake of convenience and by consent of parties as sought to be contended by the learned Government Pleader.

12. After giving my anxious consideration to the respective submissions made by the learned Counsel appearing for the parties, it appears to me that the Inquiring Officer, as a matter of fact, made a joint and/or common trial in respect of all the delinquent officers and it cannot be contended that the case of each of the delinquent officer was dealt with independently although all the three departmental enquiries were made analogously as sought to be contended by the learned Government Pleader. The evidences and/or the statements made by each of the delinquent officers were freely used against the other delinquent officers, including the petitioner, for the purpose of making finding in respect of each of the three charges levelled against the petitioner. In such circumstances, Mr. Mukherjee is right in contending that the joint and or common trial was held admittedly, without any sanction from the Governor and/or any other appropriate authority referred to in the said Classification Control and Appeal Rules, 1971 and in view of violation of the statutory provisions concerning a joint or common trial such joint and/or common trial was illegal. I am also of the view that the petitioner was highly prejudiced by such joint and/or common trial because the statements of the other delinquent officers were relied on against the petitioner without giving the petitioner any opportunity to examine the said delinquent officers and to controvert the statements made by them relating to the charges.

levelled against them in the separate departmental proceedings initiated against them.

13. In view of the aforesaid facts, it is quite evident that the inquiry report in respect of all the said charges is not maintainable in law and actions taken on the basis of such inquiry report, namely, issue of a second show-cause notice and the passing of the impugned order of compulsory retirement, are also not maintainable and the Rule must succeed on that score alone.

14. Mr. Mukherjee lastly contended that in any event, the impugned order of punishment cannot be sustained in law in view of the fact that there was no application of mind by the punishing authority. Mr. Mukherjee contended that it will appear from the order of punishment passed against the petitioner that the punishing authority only mechanically stated that on consideration of the representation made by the petitioner and the finding made by the Inquiring Officer and considering the recommendation made by Public Service Commission, the impugned order of punishment was passed by the punishing authority. Mr. Mukherjee contended that there was no real consideration in the case but there was only a show of consideration by the mere use of the expression "considered". Mr. Mukherjee further contended that in the answer to the second show cause notice, the petitioner pointed out in detail the irregularities committed by the Inquiring Officer and it was also stated by the petitioner that how on pure surmise and conjecture certain findings were made although no evidence or proof was given by the department concerned. The punishing authority was legally bound to consider the said contentions of the petitioner made in his representation in answer to the second show cause notice and by mere mechanical disposal of such representation without application of mind, it cannot be held that there had been substantial compliance with the mandatory requirements of consideration of such representation of the delinquent officer by the punishing authority. Mr. Mukherjee contended that it is now well-settled that even at the second show cause stage, it is open to the delinquent officer not only to show cause against the punishment proposed but also to plead total innocence. For this contention Mr. Mukherjee referred to the decision of the Supreme Court made in the case of (4) *State of Assam & another v. Bimal Kumar Pandit*, reported in AIR (1963) SC 1612. It was held in the said decision that there is no doubt that in response to this notice, the public officer is entitled to show cause not only against the action proposed to be taken against him, but also against the validity or the correctness of the findings recorded by the enquiring officer and provisionally accepted by the dismissing authority. In other words, the second opportunity enables the public officer to cover the entire ground.

15. As a proposition of law, no exception can be taken to Mr. Mukherjee's contention that the punishing authority must apply his mind

to the facts and circumstances of the case and materials on record before issuing a second show cause notice and the punishing authority should also take into consideration the materials on record and the representation of the delinquent officer in answer to second show cause notice proposing punishment and such consideration must be real and not a mere show of consideration. It may however be noted in this connection that there is no fixed criteria for such consideration and whether there has been real consideration or not of all the relevant materials by the punishing authority, is to be ascertained from the facts and circumstances of each case.

16. The learned Government Pleader, followed by Mr. Samarjit Gupta, however, fairly conceded that the punishing authority should apply his mind and consider the representation made by the delinquent officer. But, the learned Counsel for the State respondent submitted, that in the instant case there has been application of mind and it cannot be contended that there was only mechanical reference of the charges levelled against the petitioner and the finding made by the Inquiring Officer. The learned Government Counsel also submitted that it was not correct to allege that there was only a show of consideration but there was no real consideration of the facts and circumstances of the case by the punishing authority. Mr. Samarjit Gupta the learned Counsel appearing with the learned Government Pleader further contended that the punishing authority initially proposed to impose a punishment of dismissal in the second show-cause notice but after considering the representation of delinquent officer and also considering the recommendations of the Public Service Commission the proposed punishment in the second show-cause notice was not ultimately passed by the punishing authority but instead of proposed punishment of dismissal, an order of compulsory retirement was passed. It is thus apparent that there was a clear application of mind by the punishing authority and it cannot be contended that there was no real consideration but only a show of consideration. The learned Government Counsel contended that it is not necessary to state in so many words that after considering the representation of the delinquent officer, the proposed punishment in the second show-cause notice was not considered just and proper. The very fact that a different punishment was ultimately imposed will establish the fact that the punishing authority adverted to the facts and circumstances of the case and passed the impugned order of punishment. In this connexion, the learned Government Pleader also referred to the decision of the Supreme Court made in the case of (5) *Barium Chemicals v. A. J. Rana*, reported in AIR (1972) SC page 591 and also the decision of the Supreme Court made in the case of (6) *Divisonal Personnel Officer South-Eastern Railway v. T. R. Challappan*, reported in AIR 1975 SC page 2216. In the aforesaid decision the meaning and import of the expression "consider" were discussed by

the Supreme Court and relying on the said two decisions the learned Government Pleader contended that the punishing authority as a matter of fact, adverted to the facts and circumstances of the case and the representation made by the petitioner and as the punishing authority really concurred with the finding of the Inquiring Officer and also the recommendation of the Public Service Commission, the punishing authority did not set out the reasons in detail and in such circumstances the detailed reasons are also required to be given. In my view, there is substance in the contention of the learned Counsel appearing for the State in this regard. In the facts and circumstances of the case, it cannot be contended that the punishing authority really did not take into consideration the representation of the petitioner and or the finding made by Inquiring Officer and the recommendation given by the Public Service Commission. The impugned order is undoubtedly very cryptic and the reasons have not been specifically given but in the special facts and circumstances of the case. I am of the view that the punishing authority adverted to the facts and circumstances of the case and based his finding on consideration of the materials on record. It may be pointed out, in this connection that there was a lot of controversy over the fact as to whether the impugned order is liable to be struck down also on the ground that the opinion of the Public Service Commission since obtained before issue of the second show-cause notice was not disclosed to the petitioner, thereby depriving him to make proper representation. It was contended on behalf of the petitioner that when the punishing authority obtained the view of the Public Service Commission before issuing the second show-cause notice, such view of the Public Service Commission should have been disclosed to the petitioner so that the petitioner was in a position to make proper representation and could deal also with the views expressed by the Public Service Commission which obviously influenced the punishing authority in the matter of issuing the second show-cause notice. As a matter of fact, at one stage, the learned Government Pleader fairly conceded before this Court that as the view of the Public Service Commission was not disclosed to the petitioner, the petitioner may be given a further chance to show cause against the second show cause notice after service of the report of the public service Commission and the punishing authority may take appropriate action in accordance with law on consideration of such representation to the second show cause notice. Mr. Samarjit Gupta the learned Counsel appearing with the learned Government Pleader, however subsequently contended that from the materials on record it transpires that the Public Service Commission was not really consulted before issue of the second show cause notice and as such there was no occasion to supply the views of the Public Service Commission along with the second show cause notice. He submitted that the aforesaid concession was made by the learned Government Pleader on

misconception of facts and the records clearly established that the Public Service Commission's view was taken only on one occasion and that also after the issue of the second show cause notice. Mr. Mukherjee, the learned Counsel appearing for the petitioner however, pointed out that there was a specific statement made in the affidavit-in-reply on behalf of the respondent No. 1 in the application for vacating the interim order of injunction passed in this Rule to the effect that the advice of the Public Service Commission, West Bengal was sought for and other formalities were gone through before issuing the second show cause notice and as such it was not possible to issue the said notice before 7th February, 1975. Mr. Mukherjee contended that in view of such specific statement made in the affidavit-in-reply affirmed by a responsible officer of the rank of a Deputy Secretary to the Government of West Bengal, it cannot be contended that the advice of the Public Service Commission was not taken before issue of the second show cause notice. Mr. Mukherjee contended that it is precisely for such statement in the said affidavit that the learned Government Pleader fairly conceded that the impugned order should be quashed and the petitioner should be given an opportunity to show cause afresh after service on the petitioner of the said advice given by the Public Service Commission and only thereafter the punishing authority will proceed in accordance with law. There is force in this contention of Mr. Mukherjee and in view of such specific and categorical statement made in the affidavit-in-reply by a responsible officer of the rank of a Deputy Secretary to the Government of West Bengal and in the absence of any other affidavit to the contrary it will not be proper to proceed at this stage on the footing that no advice of the Public Service Commission was taken before issue of the second show cause notice. But in view of my specific finding that the inquiry proceeding itself was vitiated because of the said joint trial held by the Inquiring Officer in breach of statutory Rule and also for serious prejudice caused to the petitioner for violation of the principles of natural justice as indicated hereinbefore, the contention as to whether the advice of the Public Service Commission was obtained before or after the second show cause notice, is only of academic importance.

17. In the circumstances, this Rule is made absolute. But I make no order as to costs. I, however, expressly make it clear that the authorities concerned will be at liberty to proceed afresh against the petitioner on the basis of the charge-sheet issued against the petitioner in accordance with law.

P. R.

[CRIMINAL REVISIONAL JURISDICTION]

Before Mr. Justice A. N. Banerjee

Decision : August 9, 1978

Santimoy Mukherjee Petitioner

Versus

Sm. Nilima Mukherjee and another Opposite parties*

Code of Criminal Procedure 1973, section 125—Claim for maintenance under, whether maintainable during the pendency of a suit for Divorce under section 13 of the Hindu Marriage Act, 1955 and irrespective of the fact as to whether a claim for alimony has been made in such matrimonial suit.

The husband filed a suit for Divorce under section 13 of the Hindu Marriage Act in which the wife had already filed an application for alimony pendente lite during the pendency of which the wife filed a petition for maintenance under section 125 of the Code of Criminal Procedure 1973 in the Court of the Chief Judicial Magistrate, Purulia. The learned Magistrate's order granting maintenance has been impugned in the instant Rule,

HELD : *Irrespective of the fact of pendency of a proceeding for Divorce and despite the fact of pendency of an application for alimony pendente lite in such matrimonial proceeding, a claim for maintenance under section 125 of the Code of Criminal Procedure is maintainable.*

Mrs. Mukti Moitra for Petitioner

Mrs. Sukiran Biswas for Opposite parties

The judgment of the Court was as follows :—

This Rule is directed against an order dated 20.1.78 passed by the learned Chief Judicial Magistrate, Purulia in a proceeding under Section 125 of the Code of Criminal Procedure 1973. The learned Magistrate allowed maintenance at the rate of Rs. 100/- per month to the opposite party No. 1, and Rs. 50/ per month to the opposite party No. 2, who is a minor.

2. Admittedly the parties were married according to Hindu rites and admittedly a son was born out of such wedlock. There is no dispute to the fact that at present the husband and the wife are living separately. The wife is living with her son. The learned magistrate found that the husband though possessed of sufficient means had refused and or neglected to maintain the wife and the minor son and that the wife was unable to maintain herself. After recording such findings the learned Magistrate proceeded to discuss the financial condition of the parties and on a consideration of such condition he allowed the maintenance at rate as stated above.

3. Mrs. Mukti Moitra, learned Advocate appearing for the

**Criminal Revision No. 407 of 1978.*

petitioner husband, took threefold objections. Her first objection was that since the husband had already filed a Matrimonial suit for Divorce against the opposite party wife on the ground of adultery and desertion and since the wife had not made any prayer for alimony pendente lite she was not entitled to claim maintenance in a separate proceeding under section 125 of the Code of Criminal Procedure. Her second objection was that during the pendency of this Rule the wife filed an application for alimony pendente lite in the Matrimonial suit and that as such her claim for maintenance in the proceeding under section 125 of the Code should be disallowed. Her third objection was that the learned Magistrate had not considered the evidence of the wife herself namely that she was somehow maintaining herself indicating thereby that it is not the case that she was unable to maintain herself. Her last point was that in any event the quantum of maintenance as assessed by the learned Magistrate is much too excessive and disproportionate to the income of the petitioner.

4. Mrs. Sukiron Biswas, learned Advocate appearing for the wife opposite party supported the case of the learned Magistrate. Having heard the learned Advocates of the respective parties and on a consideration of the materials before me I see not much substance in the first four objections raised by Mrs. Moitra. It may be that a matrimonial suit for Divorce is pending. But that does not prevent the wife from claiming maintenance in a proceeding under section 125 of the Code of Criminal Procedure no matter whether she has claimed or not any alimony pendente lite in the matrimonial proceeding. I am further of the view that the learned Magistrate was justified in finding that the wife opposite party was not in a position to maintain herself. It may be that the wife in her evidence stated that she was somehow maintaining herself. But her evidence and that of her brother as well, make it abundantly clear that she is living on the charity of her brother. There can be thus no manner of doubt that she is unable to maintain herself. On the question of refusal and the neglect to maintain her, Mrs. Moitra has not said anything. Now coming to the question of the quantum of maintenance, I am of the view that having regard to the status of the parties and the financial condition of the husband, ends of justice would be sufficiently met if the order of the learned Magistrate is modified to this extent only, namely that the opposite party wife will get maintenance at the rate of Rs. 70/- per month and that the order of the learned Magistrate will become effective from the date of the passing of the order that is to say 20.1.78. With the above modifications of the impugned order of the learned magistrate, the Rule is disposed of.

S. P. M.

[CIVIL APPELLATE JURISDICTION]
 Before Mr. Justice Anil K. Sen and Mr. Justice
 B. C. Chakrabarti

Decision : November 20, 1978

Banshi Dhar Chakravorty ... Appellant

Versus

Sri Nemai & ors. ... Respondents*

Shebaitship right, Whether alienable—Adverse possession.

C. and B., two brothers executed a Deed of Endowment on October 3, 1929 whereby they dedicated suit properties in favour of their ancestral deity, appointed themselves as shebait during their life time and directed that on their death their respective heirs in succession would be the shebait. On death of C. his interest devolved upon plaintiff and on his brother's son, defendant No. 1. B's interest devolved on his sons, defendants No. 2, 3 and 4. According to the turn of worship agreed upon by the parties, plaintiff and defendant No. 1 had pala for 15 days in a month. By a registered Deed of gift dated April 6, 1948, plaintiff made a gift of his shebaiti in favour of defendant No. 1. In 1962 on the allegation that the defendant No. 1 was ousting and obstructing the plaintiff in performing seva puja of the deity, plaintiff instituted a suit for injunction. Defendant No. 1 contested the suit and impleaded the Deed of gift and claimed exclusive right of shebaitship. Both the courts below held that the Deed of gift was valid and dismissed the suit. They took the view that the gift of shebaitship was valid as it was not for any pecuniary benefit and was made in the interest of the deity. Plaintiff then preferred the second appeal to High Court, where the Judge held that shebaitship being inalienable in law, defendant No. 1 acquired no right, title or interest in law by the said gift, he decreed the plaintiff's suit for injunction, Defendant No. 1 then preferred the appeal under cl. 15 of the Letters Patent and contended (1) that the alienation was valid, being renunciation in favour of a shebait and not for any pecuniary benefit of the transferor, and (2) that defendant No. 1 acquired a valid title to shebaiti right by adverse possession.

HELD : *The alienation of shebaitship was valid as the transfer was not for any pecuniary benefit and was in favour of the successor of the holder of office. The impugned transfer may also be upheld though not as a transfer but as surrender in favour of the next heir. Shebaitship is not a mere office but it is property as well. Though the document may fail in law, the defendant No. 1 having come into possession in his own right and having enjoyed the property as such for long over 12 years must be held to have acquired title by adverse possession. The appeal is allowed.*

Cases referred to :—

(1) *Nerode Mohini v. Sibdas*, ILR 36 Cal 975

*L. P. A. No. 17 of 1975.

- (2) *Nagendra Nath v. Rabindra*, ILR 53 Cal. 132
 - (3) *Baneswar v. Anath*, AIR 1951 Cal. 490
 - (4) *Ramratan v. Bajranglal*, AIR 1978 SC 1393
 - (5) *Monohar v. Bhupendra*, ILR 60 Cal. 432
 - (6) *Padma Vithoba v. Md. Multani*, AIR 1973 SC 70
 - (7) *Palani Bala v. Kalipada*, 54 CWN 960
 - (8) *Gnanasambanda Pandara Sunnadhi v. Velu Pandaram*, LR 27 IA 69
- Ranjit Kumar Banerjee, Aditya Narayan Roy and
Amiya Narayan Mukherjee* for appellant
Monomohan Mukherjee and Gouri Prasad Mukherjee ... for respondents

The judgment of the Court was as follows:—

Sen, J. : This appeal under clause 15 of the Letters Patent is directed against the judgment and decree dated June 24, 1974, passed by N. C. Mukherji, J. in Second Appeal No. 2459 of 1965. This appeal arises out of a suit for injunction which was dismissed concurrently by the two courts below but was decreed by our learned brother N. C. Mukherji, J. by the judgment and decree under appeal. The facts which led to the suit may be stated briefly as follows :—

2. Two brothers Chandi Charan and Baladeb dedicated the suit properties in favour of their ancestral deity Sree Sree Sitala Debi Thakurani by a Deed of Endowment dated October 3, 1929. By the endowment they appointed themselves to be the Shebaitis during their lifetime and it was further provided that on their death their respective heirs in succession would be the Shebaitis. The endowment incorporated the usual restriction that the Shebaitis for the time being would carry on the Devseva of the deity and would manage and use the suit property for the said purpose but would not be entitled to transfer the same in any manner or use it as their personal property. Chandi Charan being dead it is not in dispute, his interest in Shebaiti devolved upon the plaintiff Nemaï and his brother's son defendant No. 1, Bansidhar. Baladev's interest had devolved on defendant Nos. 2 to 4 his sons. The existing Shebaitis were carrying on Devseva according to Palas agreed between them and there is no dispute that between the plaintiff and defendant No. 1 each of them was carrying on Seva Puja for 15 days in a month which fell in their allotment. By a registered Deed of Gift dated April 6, 1948 the plaintiff Nemaï made a gift of his Shebaiti in favour of his brother's son Bansidhar, the defendant No. 1. He did so as is evident from the recital in the deed on the ground that as he was doing the business of oil engine repairing work which led him to go to different places frequently he was unable to perform the Seva Puja of the deity Sree Sree Sitala Debi Thakurani. The deed further recited that in future there is no hope or expectation that he shall be able to perform his duty as a Shebait and since the donee, his nephew was performing the Seva Puja of the deity devoutly, attentively and whole-heartedly and

according to Hindu rites, for the benefit of the deity the Shebaiti should be gifted in his favour.

3. On November 8, 1962, totally suppressing the said gift in favour of defendant No. 1, the plaintiff Nemaï instituted the suit out of which the present appeal arises upon an allegation that while the plaintiff was carrying on the Seva Puja jointly with the defendant No. 1 in the Pala allotted to them, defendant No. 1 since 17th Kartick, 1369 B. S. threatened to oust him from the Office of Shebait and to obstruct him to perform the Seva Puja of the deity. On this simple allegation, he instituted a suit for injunction restraining the defendant No. 1 from doing so.

4. Defendant No. 1 in contesting the said suit filed a written statement pleading the gift dated April 6, 1948, as above in his favour and further pleading that by virtue of the said gift he had been performing and enjoying the Shebaiti Pala allotted to him and the plaintiff since April 1948. Defendant No. 1 thus claimed exclusive right to the Pala allotted in favour of the plaintiff and the defendant No. 1. On the written statement so filed, the plaint was amended and the plaintiff pleaded the gift to be fictitious, illegal and fraudulent. He further pleaded that the said gift was never acted upon. By an additional written statement filed on behalf of the defendant No. 1, such a claim was strongly controverted.

5. Evidence being led, both the courts below concurrently found that the plaintiff Nemaï had executed a Deed of Gift dated April 6, 1948, voluntarily and there was no fraud or coercion in the matter of execution of said Deed in favour of defendant No. 1. It was also found that the defendant No. 1 came into possession of the Shebaiti in the Pala allotted in favour of the plaintiff and defendant No. 1 by virtue of such a Gift since April 1948. On the question of legality the two courts below took the view that though Shebaiti is not ordinarily alienable in law but nonetheless the gift in question is valid as it was not for any pecuniary benefit and was made in favour of a co-Shebait standing in the line of succession and suffering from no disqualification regarding the performance of the duty and that the same was made in the interest of the deity. The two courts thus upheld the gift in favour of the defendant No. 1 and dismissed the plaintiff's suit for injunction. The plaintiff Nemaï preferred the above second appeal. In disposing of the second appeal our learned brother Mukharji, J. however, took the view that though the Deed of Gift was duly executed and registered in favour of defendant No. 1 voluntarily and without any coercion or fraud yet Shebaiti being inalienable in law, defendant No. 1 acquired no right, title and interest in law by the said gift. In that view, our learned brother set aside the concurrent decisions of the two courts below and decreed the plaintiff's suit for injunction. Hence, the present appeal under clause 15 of the Letters Patent.

6. Mr. Banerji appearing in support of this appeal has raised two

points. In the first place, Mr. Banerji has contended that our learned brother Mukherji, J. failed to take into consideration the fact that though Shebaiti is not ordinarily alienable yet an alienation which constitutes, as in the present case, renunciation of the Shebaiti in favour of a Co-Shebait standing in the line of succession, such a transfer is not invalid if it is made not for any pecuniary benefit of the transferor. Secondly it has been contended by Mr. Banerji that Shebaiti being itself a property when the defendant No. 1 by virtue of the gift came to possess and enjoy the said Shebaiti since 1948, he must be deemed to have acquired a valid title thereto by adverse possession even if the Deed must fail on the ground that it is not a valid transaction in law. Both the points thus raised by Mr. Banerji has strongly been controverted by Mr. Mukherji who is appearing for the plaintiff/respondent in this appeal.

7. We have carefully considered both the points raised by Mr. Banerji and in our view there is ample substance in the contentions so raised by Mr. Banerji. In our view, our learned brother Mukherji, J. was following the settled principle that Shebaiti though heritable lacks the other incidence of proprietary right, namely, the capacity of being freely transferred by a person in whom it is vested. The said principle is obviously based on the fact that the personal proprietary interest which a Shebait has got is ancillary and inseverable from his duties as a ministrant of the deity and the manager of its temporalities : as the personal interest cannot be detached from the duties, the transfer of Shebaitship would mean delegation of the duties of the transferor which would not only be contrary to the expressed intentions of the founder but would contravene the very policy of law (See-Dr. B. K. Mukherjee on Hindu Law of Religious and Charitable Trust, 1st Edition, Page 228). Though such is the ordinary principle, certain exceptions have been recognised by judicial decisions. Though as has been rightly pointed out by the learned judge in the courts below there is no uniformity amongst the courts in respect of the extent of such exceptions it is almost well settled that all the High Courts have upheld such an alienation where the transfer is not for any pecuniary benefit and the transfer is in favour of the successor of the holder of the office who makes the transfer. Such a transfer is upheld for the reason that the same constitutes renunciation in favour of the next heir and such surrender of Shebaitship does not offend either the intention of the founder or the general policy of Hindu Law. It appears to us that our learned brother Mukherji, J. did not consider the impugned transfer from this aspect and did not come to any conclusion as to whether the same can be upheld though not as a transfer but as a surrender in favour of the next heir.

8. Mr. Mukherji appearing for the plaintiff/respondent has contended that the two courts below upheld the gift not on the ground that it

really constitutes renunciation in favour of the next heir but as a transfer in favour of a co-Shebait standing in the line of succession who suffers no disqualification regarding the performance of his duties and that the transfer is beneficial to the interest of the deity. The Courts below have strongly relied on an earlier decision of this court in the case of (1) *Nerode Mohini v. Sibdas*, ILR 36 Calcutta 975. It appears to us that the transfer impugned in the present case stands practically in the same position as the one upheld as valid in the above decision of this court. But according to Mr. Mukherji, a transfer in favour of a co-Shebait only because he is a co-Shebait or that he stands in the line of succession does not render the transfer valid since such a transfer remains a transfer not recognised by Hindu Law. Moreover, according to Mr. Mukherji whether the transfer is for the benefit of the deity or not is wholly inconsequential. Of course, the view expressed by this court in the above decision was critically reviewed by Page, J. in the case of (2) *Nagendra Nath v. Rabindra*, ILR 53 Calcutta 132 and Dasgupta, J. (as His Lordship then was) in the case of (3) *Baneswar v. Anath*, AIR 1951 Calcutta 490. It would, however, be pertinent to refer to a very recent decision of the Supreme Court throwing some light over the disputed principle. In the case of (4) *Ramratan v. Bajranglal*, AIR 1978 SC 1393 it was observed : "Shebaiti being held to be a property, in (5) *Angurbala Mullick v. Debra brata Mullick*, 1951 SCR 1125, this Court recognised the right of a family to succeed to the religious Office of Shebaitship. This hereditary office of Shebaitship is traceable to old Hindu text and is a recognised concept of traditional Hindu Law. It appears to be heritable and partable in the strict sense that it is enjoyed by the heirs of equal degree by turn and transferable by gift subject to the limitation that it may not pass to a non-Hindu. On principles of morality and propriety sale of the office of Shebaitship is not favoured." If a transfer by gift subject to the limits indicated by the Supreme Court is permissible in law certainly Mr. Banerji can rightly contend that the impugned transfer in the present case cannot be held to be in any way invalid. That apart, even accepting the contention of Mr. Mukherji, in our view the impugned transfer may be upheld though not as a transfer but as a surrender in favour of the next heir. Such a transaction has been upheld uniformly by all the High Courts though the Bombay High Court appears to have extended the principle to uphold a transfer in favour of any one standing in the line of succession of Shebaits. In the present case, as it appears, the plaintiff and the defendant No. 1 inherited the Shebaiti from Chandi Charan. While they were jointly enjoying the office as such Shebaits, the plaintiff executed the gift in favour of defendant No. 1, his brother's son. It was so executed in the year 1948 and the evidence adduced in the present case do not show that at the date of the transfer any one else stood in the position of next heir other than the defendant No. 1, the brother's son of the plaintiff.

Such being the position, we cannot but uphold the transfer as a valid one since though the transfer may not be upheld as a transfer it can very well be upheld as a renunciation in favour of the next heir. In our view, our learned brother Mukherjee, J. failed to take into consideration this aspect of the case altogether.

9. So far as the second point raised by Mr. Banerji is concerned, it appears to us that there is ample substance therein also. The Full Bench decision of this court in the case of (6) *Monohar v. Bhupendra* ILR 60 Calcutta 432 having been approved by the Privy Council as also by the Supreme Court it is now well settled that Shebaitship is not mere office, it is property as well. On the facts of the present case it is well established that the defendant No. 1 came into possession of such a property as early as in April 1948, by virtue of a gift by the plaintiff in his favour and that so far as the Pala in their favour is concerned, had been exclusively enjoyed and possessed by defendant No. 1 for all these years. Though the document may fail in law, the defendant No. 1 having come into possession in his own rights and having enjoyed the property as such for long over 12 years, must be held to have acquired title by adverse possession (7) See-*Padma Vithoba v. Md. Multani*, AIR 1973 SC 70. That one can acquire title to the hereditary office of Shebaitship by adverse possession is now well recognised, See (8) *Palani Bala v. Kalipada*, 54 CWN 960 and (9) *Gnanasambanda Pandara Sunnadhi v. Velu Pandaram*, LR 27 IA 69 at page 77.

10. For the reasons given, both the points raised by Mr. Banerji succeed. The appeal is accordingly allowed. The judgment and decree passed by N. C. Mukherji, J. are set aside and those of the trial court are restored. There will be no order for costs in this appeal. Appellant may be discharged from the security.

Chakrabarti, J. : I agree.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Salil Kumar Datta

Decision November, 10, 1978

Biswanath Bandopadhyay ... Appellant

Versus

Sm. Purnamoni Dassi and another ... Respondents*.

Possessory title—In the assumed character of owner, Whether valid against all except the legal owner—Suit by a person in prior possession—Whether maintainable against a wrongdoer—Prior possession—Whether a sufficient title against a wrongdoer in an action for ejectment.

* Appeal from Appellate Decree no. 1602 of 1970.

The legal owners of the disputed plot abandoned the plot and the plaintiffs were in peaceful possession of the said plots for more than twelve years and filed a suit for restraining the defendants for interfering with the plaintiff's possession. The suit was dismissed by the trial court but decreed by the lower appellate Court. The point for consideration in the second appeal was whether the suit was maintainable by the plaintiffs.

HELD : *Between a wrongdoer and a prior possessor, prior possession of the plaintiff in an action for ejectment is sufficient title against all but the true owner and the defendant is not entitled to question the maintainability of the suit on the ground that the title and right to possession are in a third person.*

Cases referred to :—

(1) *Nair Service Society Ltd. v. K. C. Alexander and anr.*, AIR 1968 SC 1165

(2) *Perry v. Clissold*, 1907 AC 73

(3) *Somenath v. Dr. S. P. Raju*, AIR 1970 SC 846

Monomohan Mukherjee and Gauri Prasad Mukherjee for Appellant
R. L. Tarafdar and Roma Prasad Tarafdar for Respondents

The judgment of the Court was as follows :—

This is an appeal by the defendant against a judgment of reversal.

2. According to the plaintiffs respondents' case, the suit land situate in Mouja Patsimulia, P.S. Bongaon, 24-Parganas and recorded in R.S. Khatian No. 467, Dag 220/745 measuring 73 decimals with jama of Rs. 2.75 belonged to Kachhimuddin Molla and Abu Taleb Molla in raiyati interest. In Chaitra 1356 B. S., this property was exchanged for the properties of the plaintiffs in the then East Pakistan. But to communal disturbances, the transaction was done in haste and no formal deed was entered into between the parties. The land valued at Rs. 100/- had since then been in possession of the plaintiffs who had been cultivating the same without interruption for long over twelve years, thereby acquiring, in addition, title thereto by statutory right. The plaintiffs duly informed the Settlement Officer of the R.S. Settlement operations about their possession of the land on basis of exchange and were assured that their names would be duly recorded. Accordingly they went on possessing the land taking no further steps. The plaintiffs came to learn that in respect of the said jama, the defendant's name was erroneously recorded for about 2/3rd share with the plaintiffs' names in the balance separately for about 1/6th share each. This recording was erroneous, without basis and illegal, as the defendant never had any right, title or interest or possession in the suit land. As the defendant had been threatening dispossession since April 3, 1965, the plaintiffs instituted the suit on May 19, 1965 praying for a declaration of their title to the suit land and for injunction restraining the defendant from interfering with their possession thereof.

3. The suit was contested by the defendant who in his written statement denied the alleged exchange and its legality without any registered document as required in law and also the plaintiffs' alleged possession thereof. It was said that the raiyats Kachhimuddin and Abu Taleb abandoned for good the land in the latter part of 1355 B. S. without making any arrangement for rent when the landlords entered on the holding and orally settled the same to the defendant from the beginning of 1356 B. S. on acceptance of selami at a jama of Rs. 2.75 only. Since then the defendant had been in possession thereof on payment of rent to the landlords and on vesting to the State of West Bengal. During Settlement operations, the plaintiffs taking advantage of non-receipt of dakhila from a co-sharer landlord fraudulently got their names recorded in respect of 19 decimals of land of the said dag. Thereafter by amicable arrangement, at the mediation of local respectable persons, the defendant had been in possession and cultivating 54 decimals of the eastern portion of the dag for long over twelve years on payment of rent to the State of West Bengal while the remaining area came into possession of the plaintiffs. The plaintiffs suit should accordingly be dismissed.

4. In the trial on evidence, the learned Munsif held that there could be no presumption of correctness of the settlement record in view of the challenge made by both parties, and further that in absence of a registered deed the plaintiff could acquire no title to the suit land on the alleged exchange. The plaintiffs case of exchange or possession on oral evidence was disbelieved in absence of any rent receipt from the landlords or mutation of their names during 1356 to 1361 B. S. when there was vesting of the superior interest. Even the oral evidence of the P. Ws. it was held was inconsistent with the plaintiffs' case of alleged possession since 1356 B. S. as the erstwhile owners, according to such evidence, left for Pakistan in 1359 B. S., so that there could be no exchange in 1356 B. S. On the above findings the suit was dismissed.

5. Before the appellate court, the plaintiffs relied on the acquisition of title not on exchange in absence of any registered instrument, but on their possession for long over twelve years adversely to the real owners. The learned Judge found that there was sufficient acceptable evidence to show that the plaintiffs had been in possession of the suit property since Chaitra 1356 B. S. while there was no evidence of abandonment by former raiyats or of the entry by landlords or of the possession by the defendant in support of defence. It was further held that the suit for declaration of title on basis of possession was maintainable against all except the rightful owner. It was also held on evidence that the plaintiffs had been in adverse possession of the land for the statutory period and were entitled to protection particularly against the defendant. The appeal was accordingly allowed and the suit was decreed in part, restraining the

defendant permanently from causing any disturbance in the plaintiffs' possession of the suit land. The present appeal is against this decision.

6. It is not necessary for us to consider if the plaintiffs could acquire title on basis of the alleged exchange without any registered document in support, as before the appellate court the plaintiffs gave up their untenable case of acquisition of title by exchange not evidenced by any registered document as required by section 26C of the Bengal Tenancy Act, 1885. The plaintiffs claimed their right to the reliefs claimed, which has been upheld by the appellate court, on basis of their title to the suit lands acquired by adverse possession since Chaitra 1356 B.S. against all over the statutory period. Even if the assertion of adverse title was not against the owners, could the plaintiffs in possession of the suit lands assert their possessory title against all interference except by the rightful owners? The appellate court held that the plaintiffs were entitled to such right on the finding that the plaintiffs had been in possession of the suit land at the time of such interference.

7. The appellate court disbelieved the defence case of abandonment of the suit land by the recorded raiyats and of fresh settlement thereof to the defendant on entry by them thereafter discarding the rent receipts by the erstwhile landlords as not genuine. The appellate court also accepted the plaintiffs' case of possession of the suit land since about the time of alleged exchange. These findings are findings of fact not liable to be interfered with in a second appeal and no grounds have been established in this court to interfere with those as being based on inadmissible evidence or without evidence or otherwise. The same is the position in regard to rent receipts Exts. A and A1., found, as already stated, to be not genuine on scrutiny. The rent receipts granted by the State (A2-A6) were merely in terms of the Record of Rights which, by themselves do not confer any title and according to defence were erroneous, though the plaintiffs also did not state why they did not possess any rent receipts while claiming payment of rent.

8. The defence case of abandonment was held by the appellate court as not proved and, it appears, no evidence of notice as required under Sub-section 2 of Section 87 of the Act was produced. In fact, the hand of the co-sharer landlord Sibapada, who happened to be a cousin of the defendant and supported his case as the only other witness of defence, could be found in Ext. A1 and A6 as being the person depositing the rent which was obviously no business of his.

9. The point for consideration now is about the maintainability of the suit with reference to the relief for injunction from interference with the plaintiffs' possession of the suit land in the context of their possession thereof as found by the appellate Court. As has been noted in the case of (1) *Nair Service Society Ltd v. K. C. Alexander and another*.

AIR 1968 SC 1165, the Supreme Court quoted with approval the following proposition of law laid down in (2) *Perry v. Clissold*, 1907 AC 73.

"It cannot be disputed that a person in possessions of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of limitation applicable to in the case, his right for ever is extinguished, and the possessory owner acquires absolute title."

Following the above principle, it was held in (3) *Somnath v. Dr. S. P. Raju*, AIR 1970 SC 846, that between a wrongdoer and the prior possessor, prior possession of the plaintiff in an action for ejectment is sufficient title against all but the true owner and the wrongdoer cannot successfully resist the suit by showing that the title and right to possession are in a third person.

10. The suit by the plaintiffs in the instant case is for an injunction against a wrongdoer, as found by the appellate Court not against the defendant as an agent of the rightful owner or tenant while the case of the defendants tenancy had been rejected by the appellate court. The relief claimed is for restraining such defendant as a trespasser from interfering with the plaintiffs' prior possession. The suit, in the light of the propositions of law indicated above is thus maintainable in law. The plaintiffs were rightly held entitled to such injunction against the defendant except the true owner, as the former tenant or their landlords now the State unless their title is perfected by adverse possession which is not the case before us.

11. The appeal accordingly fails and is dismissed with costs.

P. R.

[ORIGINAL CIVIL JURISDICTION]

Before Mr. Justice Sabyasachi Mukharji

Decision August 31, 1978

Sitaram Rice Mills Petitioner

Versus

Union of India Respondent*

Arbitration Act (1 of 1940), sec. 20—Filing of arbitration agreement

— Jurisdiction of Court.

Petitioner made an application under sec. 20 of the Arbitration Act, 1940 to file an arbitration agreement in the High Court at Calcutta. In the contract between the parties there was an arbitration clause of the

*Special Case no. 8 of 1978.

widest amplitude. Clause 20(3) of the contract provided that the court of the place from where the acceptance of the tender was issued should alone have jurisdiction to decide any dispute in respect of the contract. Acceptance of tender was issued from New Delhi. Part of cause of action arose in Calcutta and Delhi.

HELD : Under sec. 20 of the Arbitration Act, 1940 before an arbitration agreement can be directed to be filed, the court must come to the conclusion that dispute has arisen to which the agreement relates. If the parties have chosen to go to a court having jurisdiction to decide whether a dispute has arisen in respect of the contract, then the parties must be made to abide by the said bargain. Parties cannot confer jurisdiction on courts not having such jurisdiction nor can they oust the jurisdiction of a competent court. But the parties are competent to bargain that out of courts having jurisdiction one would be preferred to the others. In the instant case, parties have chosen to go to the place from where the acceptance of the tender was issued in respect of all disputes arising out of and in respect of the contract. One of the main conditions under sec. 20 of the Act is to adjudicate that there is a dispute arising out of and in respect of the contract by the court and that court alone should have jurisdiction. The application is dismissed.

Cases referred to :—

- (1) *Nazir Chand Mabijan & Anr. v. Union of India*, AIR 1967 SC 990
- (2) *M/s. Parbhat General Agencies v. Union of India*, 1971 (1) SCR 79 : AIR 1971 SC 2298
- (3) *M/s. Dhanrajamal Govindram v. M/s. Shamji Kalidas & Co.*, AIR 1961 SC 1885
- (4) *Marcandy Prasad Radha Krishna Prasad Pvt. Ltd. v. Union of India*, (Suit No. 12 of 1974) judgment delivered on 12.9.75
- (5) *Hindusthan Laminators v. F. C. I. (Calcutta Division)* (special suit No. 25 of 1977, judgment delivered on 14.9.77)
- (6) *Hakum Chand v. Gamon (India) Ltd.*, AIR 1971 SC 740
- (7) *S. C. Mallick v. Union of India*, AIR 1972 Delhi 211
- (8) *Sampatram Damani v. Toshiba Anand Lamps* (Special Suit No. 12 of 1976)
- (9) *The Electrical Manufacturing Co. Ltd. v. Crompton Engineering Co. (Madras) Ltd.* AIR 1974 Mad. 261

<i>B. K. Bachawat and Pinaki Ghose</i>	...	...	...for petitioner
<i>T. K. Basu and Dipak Basu</i>	...	...	...for respondent

The judgment of the Court was as follows :—

This is an application under Sec. 20 of the Arbitration Act, 1940. The arbitration clause is contained in Clause 24 of the contract of the tender. The said clause has been set out in extenso in paragraph 9 of the petition. It is of the widest amplitude and it covers any questions, disputes or differences arising under those conditions or the special conditions

of contract or in connection with the contract except certain specially exempted matters. Clause 20(3) of the conditions of contract reads as follows :

“Jurisdiction of Courts - The courts of the place from where the acceptance of tender has been issued shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract.”

2. On behalf of the petitioner, it was contended that there was no averment that the Delhi High Court or the Delhi Court has jurisdiction to entertain this dispute and there was no averment that any part of the cause of action has arisen within the jurisdiction of the Delhi Court. I am, however, unable to accept this contention because paragraph 31 of the affidavit-in-opposition clearly alleges that the acceptance of the tender was issued from New Delhi which is outside the jurisdiction of this Court. Therefore, the position appears to be that a part of cause of action in respect of this contract had arisen both at Calcutta and as well as at Delhi. The question is, what is the effect of the aforesaid clause, viz. Clause 20(3) of the Arbitration agreement set out hereinbefore. Under Sec. 20 of the Arbitration Act, 1940, before an arbitration agreement can be directed to be filed, the Court must come to a conclusion that the dispute has arisen to which the agreement relates. Therefore, there must be an adjudication or a finding that disputes or differences to which the agreement relates have arisen. That is a condition precedent under sub-section (1) of Sec. 20 of the Arbitration Act, 1940 before directing the filing of the arbitration agreement. This clause, viz. Clause 20 (3) binds the party to go to the forum of that court, that is to say, the place from where the acceptance of tender has been issued.

3. On behalf of the petitioner, it was, however, argued that the choice was only in respect of any dispute arising out of or in respect of the contract. It was submitted that a dispute as to whether a contract should be filed under Sec. 20 of the Arbitration Act, 1940 is not a dispute arising out of or in respect of the contract. I am unable to accept this position because, as I have mentioned before, the first condition required to be fulfilled under Sec. 20 is that there is a dispute arising out of or in respect of the agreement. Therefore, that will be a decision on the question whether there is a dispute arising out of or in respect of the contract. If the parties have chosen to go to a Court having jurisdiction to decide whether a dispute has arisen out of or in respect of the contract then in the absence of any special circumstances, the parties must be made to abide by the said bargain. The principles are well settled. The parties cannot confer jurisdiction on Courts not having such jurisdiction nor the parties can oust the jurisdiction of a competent Court. But the parties are competent to bargain that out of Courts having jurisdiction one would be preferred to the others. If such is the bargain then the Court would normally hold the parties to that bargain.

4. On behalf of the petitioner, it was contended on the basis of the observations of the Supreme Court in the case (1) *Nazir Chand Mahajan & anr. v. Union of India*, AIR 1957 SC 990 at p. 993 that section 20 of the Arbitration Act was merely for the purpose of affectuating the arbitration agreement. Reliance was also placed on certain observations of the Supreme Court in the case of (2) *M/s. Parbhat General Agencies v. Union of India*, 1971 (1) SCR 79 : AIR 1971 SC 2298 for the proposition that Sec. 20 of the Arbitration Act was merely a machinery provision. Also reliance was placed on the observations of the Supreme Court in the case of (3) *M/s. Dhanrajmal Gobindaram v. M/s. Shamji Kalidas & Co.*, AIR 1961 SC 1285 at p. 1293-94 in aid of the proposition that Sec. 20 only involved some ministerial act. Some of these aspects of the matter were considered very exhaustively by Mr. Justice Salil Kr. Roy Chowdhury in the case of (4) *Marcandy Prasad Radha Krishna Prasad Pvt. Ltd. v. Union of India* (Suit No. 12 of 1975) judgment delivered on 12th September, 1975 where his Lordship came to the conclusion in view of the clause under that contract that disputes as to the filing of the arbitration agreement under Sec. 20 were not disputes arising out of or in respect of the contract. I had also in the case of (5) *Hindusthan Laminators v. F. C. I. (Calcutta Division)* (Special Suit No. 25 of 1977) judgment delivered on 14 September, 1977 to consider this aspect of the matter. But, there, I felt bound by the ratio of the decision of the Supreme Court in the case of (6) *Hakum Singh v. Gammon, (India) Limited*, AIR 1971 SC 740 and came to the conclusion that clause like present clause 20(3) of the contract binds the parties to the forum they have chosen even in respect of an application under Sec. 20 of the Arbitration Act. In my opinion, the said ratio would have application in the instant case also. As I have noticed that this view is in consonance with the view of the Delhi High Court in the case of (7) *S. C. Malik v. Union of India*, AIR 1972 Delhi 211 and also the observations of this Court in the case of (8) *Sampat Ram Damani v. Toshiba Anand Lamps* (Special Suit no. 12 of 1976) and the decision in the case of (9) *The Electrical Manufacturing Co. Ltd. Calcutta & Anr. v. The Crompton Engineering Co. (Madras) Ltd.* AIR 1974 Madras 261.

5. In that view of the matter and in view of the condition, as I have noted, I am of the opinion that the parties have chosen to go to the place from where the acceptance of tender was issued in respect of all disputes arising out of and in respect of contract and one of the main conditions under Section 20 is to adjudicate that there is a dispute arising out of or in respect of the contract by the court and that court alone should have jurisdiction because there are no special circumstance as such, which would incline not to compel the parties to stick to that bargain. In that view of the matter I am unable to direct the filing of the arbitration agreement in this court.

6. This application, therefore, fails and is accordingly dismissed. This order, however, will not prevent the petitioner from making any appropriate application to the appropriate Court for filing of the arbitration agreement.

7. In view of the facts and circumstances of this case the parties will pay and bear their own costs.

8. There will, however, be a stay of the operation of this order for a fortnight.

S. P. M.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Sabyasachi Mukharji

Decision, : August 16, 1978

Daughters of the Cross & others ... **Petitioners**
Versus

State of West Bengal & others ... **Respondents***

Constitution of India—Art. 30—Scope of the right of a religious minority to administer educational institution of its choice limits of regulatory power of Government—Termination of service of a teacher by the Governing Body of school established by a religious minority—If Government can interfere with such disciplinary measure and direct reinstatement of the teacher—Whether dearness allowance paid to the school by the Government can be stopped by the Government for non-compliance with Government's direction for reinstatement—Whether Government can supersede the Governing Body and appoint an Administrator over the School.

St. Agnes Government School, Howrah was established and is administered by a Roman Catholic religious congregation named "Daughters of the Cross". The administration of the school is vested in a Governing Body constituted according to the rules of the Canon law which governed the congregation. The school received grants from the State Government by way of dearness allowance for the teachers. The service of one of the teachers was terminated by the Governing Body as a disciplinary measure. The teacher concerned made a representation to the State Government protesting against the action of the Governing Body in terminating her service. The State Government after making an enquiry directed the Governing Body to reinstate the teacher. On the refusal of the Governing Body to comply, the Director of Public Instruction issued a show cause notice to the Governing Body to show cause why the dearness allowance paid to the school by the Government should not be stopped and why the recognition accorded to the school should not be withdrawn for non-compliance with the Government's direction for reinstatement of

*Matter No. 234 of 1978

the teacher. Thereafter, the Government decided to stop payment of dearness allowance to the school. Lastly, the Government appointed an Administrator to take over the administration of the School. The above orders and decisions of the State Government were challenged by the "Daughters of the Cross" by a Writ petition and a Rule was issued. The petitioner contended that the Governing Body of the School was constituted in accordance with the rules of the Canon Law by which they were governed as a religious congregation and that, interference by the Government with the disciplinary action taken against the said teacher contravened the petitioners' fundamental right to administer the school under Article 30 of the Constitution and that the same infirmity attached to the other orders and decisions of the State Government in respect of the school. It was contended on behalf of the State Government inter alia that the Governing Body of the school was not constituted according to law and that the appointment of the Administrator and the other orders were of a regulatory character intended to ensure proper administration of the school by the religious minority and as such were not in derogation of the constitutional rights of the petitioners.

HELD : (1) *The petitioners as a religious minority were governed by the Canon Law and as the Governing Body of the School was constituted in accordance with the rules of the Canon Law, it must be held that the Governing Body was lawfully constituted* (2) *The petitioners had a fundamental right under Art. 30 of the Constitution to administer the school even though the school was open for admission of students belonging to other communities.* (3) *The right to take disciplinary action against a teacher is a right pertaining to management of the school and is an exclusive right of the minority community whose school it was and could not be interfered with by the Government.* (4) *A distinction has to be observed between the right of the Government to take regulatory measures for ensuring proper administration of an educational institution of a religious minority and interference with the religious minority's right to administer the school and that in the instant case the Government had overstepped the line.* (5) *The Government cannot do indirectly what it cannot do directly under the law and that the refusal of the Governing Body of the School to reinstate the teacher could not be a valid justification for stoppage of dearness allowance to the school by the Government. The Rule should, therefore, be made absolute.*

Cases referred to :—

- (1) *Ram Jawaya v. State of Punjab*, AIR 1955 SC 549
- (2) *In re Kerala Education Bill*, AIR 1958 SC 956
- (3) *Sidhrājibhai v. State of Gujarat*, AIR 1963 SC 540
- (4) *W. Proost v. State of Bihar*, AIR 1969 SC 465
- (5) *State of Kerala v. Mother Provincial*, AIR 1970 SC 2079
- (6) *D. A. V. College, Bhatinda v. State of Punjab*, AIR 1971 SC 1731

Cross which was a religious organisation, composed of members professing the Catholic faith. One Sister Maria, Superioress of St. Vincent's Home, it is stated on behalf of the petitioners took the initiative in establishing the school and the sisters during the initial days at the school according to the narration of the petitioners, had to attend the school by crossing the river Hooghly by boat. The management of the school was entrusted with a Managing Committee nominated by and formed under the guidance of the Provincial Superior of the Calcutta Province of the Daughters of the Cross. It is the case of the petitioners that all the—religious congregations including Daughters of the Cross professing the Roman Catholic faith are constituted and function according to Canon Law i.e. laws of the Roman Catholic Church. The authority over the members of a religious congregation and its various institutions of any particular territory, according to the Canon Law, is exercised, according to the petitioners, for the said territory by a superior appointed by the Superior General of the whole Congregation. In case of religious congregation of the Daughters of the Cross, all the members of the Congregation, and all its institutions in West Bengal were directly under the jurisdiction of the Sister Provincial of Calcutta, who used to be appointed for a fixed period by the Superior General of the whole Congregation. St. Agnes's School, Howrah, being one of the educational institutions constituted and run by the Daughters of the Cross and situated within the jurisdiction of the Sister Provincial of Calcutta, the ultimate power of administration of the said school was, according to the petitioner vested in the said Sister Provincial. The said Sister Provincial in exercise of power and authority vested in her constituted the Managing Committee of the school by nominating its members and fill up vacancies as may occur due to death or otherwise by nominating new members. The said Managing Committee, was according to the petitioners, entitled to establish and administer the school in—accordance with the direction and supervision of the said Sister Provincial. In this connection the petitioners have relied upon in this application on an affidavit of Lawrance Cardinal Picachy S. J. Roman Catholic Archbishop of Calcutta. I shall have occasion to refer to the said affidavit later. The school is affiliated to the Council of Indian School Certificates examination. The said Council issues rules and circulars regarding syllabus and examination. There are, however, according to the petitioners no rules framed by the Council for the administration of the school. The School was recognised by the then Provincial Government of Bengal and is still recognised by the Government of West Bengal. The Government of Bengal in or about 1929 had framed a code known as "Code of Regulation for European Schools in Bengal" which is now known as the "Code of Regulation for European" (now Anglo Indian) Schools in Bengal (now West Bengal) 1929. The petitioners state that

the St. Agnes's School is an Anglo Indian School within the meaning of the said Code. I would have occasion to refer to the said code later. It does not appear, however, that the said code was framed by the — Government in exercise of any legislative power. According to the petitioners the said code contains only administrative instructions. It is also necessary to note that the Government of West Bengal has from time to time issued various notifications and orders granting aid to the high schools in West Bengal. Members of the teaching staff of the school like all other recognised schools used to get Rs. 162/- per month, clerical staffs used to get Rs. 139.50 per month and Class IV staffs used to get Rs. 138.50 per month as dearness allowances.

3. The genesis of trouble leading to the present application according to the petitioners is the action taken against one Mrs. Augustine a member of the teaching staff of the school. It is stated that on or about 1st of January, 1970 a letter was issued appointing Mrs. Augustine as a member of the teaching staff of the school on probation for one year. The letter of appointment, it is stated, stipulated that probation might be extended for another year during which time the agreement might be terminated with one month's notice on either side, in default of which one month's salary must be remitted. It further provided that at the end of the said period the drawing up of a formal agreement between the teacher of the management would be taken up. According to Mrs. Augustine in her affidavit in this rule no formal agreement was in fact drawn up. It is stated that Daughters of the Cross was registered as a society under the West Bengal Societies Registration Act, 1961 *inter alia*, with the object to perform, do all such things as may be deemed necessary or expedient for the education of youth, pursuit of science and general diffusion of social moral, religious and secular knowledge in accordance with the charitable, educational, moral and religious principles of the Daughters of the Cross hereinafter known as the congregation. This is the first object of the society. There were, seven members of the Governing Body and rules and regulations have been provided as required under the Societies Registration Act, 1961. Only members of the Congregation are eligible to be members of the society. 'Provincial' has been defined to mean the member of the Congregation appointed Head of the Province of Calcutta. It is further provided in the rules of the said registered Society that the Provincial for the time being shall be President of the Society and during her absence through illness or otherwise such member of the Governing Body as shall be nominated by the President shall Act as the President of the Society. The rules provided for membership and other ancillary matters. The rules also provided for convening of General Meetings which are described as Annual General Meetings and Extraordinary General Meetings. The businesses to be conducted at the Annual General Meetings are also provided and how the proceedings at the General

Meetings will be conducted have been stipulated. The rules and regulations further stipulate that the Governing Body shall consist of the President and not less than six other members of the Society who shall be appointed to the Governing Body and may be removed therefrom at any time by the President at her discretion. The members of the first Governing Body are stipulated and it is further provided that any casual vacancy which may occur in the Governing Body by reason of resignation or otherwise may be filled up by the President. The rules also stipulate the procedure to be followed by the Governing Body. The rules and regulation prescribe that the management and control of the Society shall be vested in the Governing Body who shall be entitled to exercise all such powers and do all such acts and things as the Society is authorised to do under the Act. The rules and regulations also provide for other ancillary matters like accounts, appointment of auditor etc.

4. It is stated that on or about 7th of October, 1974 two teachers, one Mrs. A. Augustine and another Mrs. Vulson were alleged to have been found fighting with each other within the school premises. It is the case of the petitioners that on being reported of the said incident the Head Teacher of the said school decided on the same day to suspend the said two teachers from services of the school on and from 7th of October, 1974 and requested the Secretary of the school to communicate the said decision to the teachers concerned and referred the matter before the Managing Committee. Sister T. Antony, acting as Secretary of the school by two separate letters dated 7th of October, 1974 communicated to the teachers concerned the said decision. A show cause notice was issued according to the petitioners to Mrs. Augustine as to why her services should not be terminated. On the 29th of October, 1974 Mrs. Augustine replied to the said show cause notice. It is stated on behalf of the petitioners that on or about 4th of December, 1974 a two member committee Consisting of Father Verstraeten, President of the Managing Committee and one Dr. S.K. Sen, a member of the Managing Committee gave a personal hearing to Mrs. Augustine on behalf of the Managing Committee. According to Mrs. Augustine, however, at the relevant time there was no properly constituted Governing Body. On 8th of December, 1974 the Managing Committee passed a resolution terminating the services of Mrs. Augustine and Mrs. Vulson by offering three months salary in lieu of notices. The said decision of the Managing Committee was communicated to Mrs. Augustine by the letter of the Secretary dated 9th of December, 1974. On the 17th of December, 1974 Mrs. Augustine instead of receiving her due in terms of the letter of termination filed a suit being Title Suit No. 180 of 1974 before the learned Fourth Munsif, Howrah. On her application the learned Munsif was pleased to pass

an ad-interim order of injunction on the same day in the said suit as prayed for by her. On the 23rd of December, 1974 the defendants to the suit entered appearance. On or about 11th of January, 1975 two applications were moved in the said suit on behalf of the defendants, one for stay of the operation of the ex-parte order passed on 17th of December, 1974 and the other for vacating or varying the interim order dated 17th of December, 1974. The learned Fourth Munsif upon hearing the parties was pleased to stay the operation of the order dated 17th of December, 1974 and gave directions for filing affidavits in the application for injunction as well as the application for variation. On or about 10th of June, 1975 after the affidavits were completed the learned Munsif by judgment and order was pleased to dismiss the application for injunction inter alia holding that the plaintiff has not acquired any statutory status, the Code of Regulations of European Schools in Bengal have no statutory force. The learned Munsif, further, held that the plaintiff has failed to establish that the order of suspension and the order of dismissal were *prima facie* illegal. The learned Munsif also came to a finding that the order of suspension was passed by the Head Mistress of the school and the same had been communicated to the two teachers by the Secretary of the School. The learned Munsif, further, held that Mrs. Augustine had been given opportunity to appear before a Committee consisting of Rev. Father Verstracton and Dr. S. K. Sen. It is stated that on the 7th of July, 1975 Mrs. Augustine preferred an appeal against the order dated 10th of June, 1975 in respect of rejecting her application for temporary injunction. The said appeal was numbered as MIS. Appeal No. 109 of 1975. The learned District Judge on her application was pleased to pass an ex-parte ad interim order restraining the President and the Secretary of the Managing Committee of the school from giving effect to the order of termination and further directed the President and the Secretary of the Managing Committee to deposit the salary of Mr. Augustine month by month with effect from July, 1975. The learned District Judge was further pleased to direct that Mrs. Augustine should not join the school till the disposal of the appeal. Thereafter on or about 14th of August, 1975 Mrs. Augustine moved an application under Article 226 of the Constitution before this High Court challenging the order of suspension dated 7th of October, 1974. It may be mentioned here that before the learned Munsif one of the objections raised on behalf of the Managing Committee was that according to the Code of Regulation for European (now Anglo Indian) School in Bengal now West Bengal, 1929 Mrs. Augustine's right if any was to move the Government and not to go to the Court. This factor is being mentioned because there is a contention raised on behalf of the respondents in this application that the petitioners are taking inconsistent attitude in this

application. However, in the application dated 14th of August 1975 referred to hereinbefore the State of West Bengal as well as the Head Mistress of the school amongst others were made party respondents. The said application was marked as Civil Rule No. 15425(W) of 1975. In the said proceedings the members of the Managing Committee, according to the petitioners, for the first time came to know that Mrs. Augustine had made a representation to the Government of West Bengal in respect of the termination of her services. It must, however be mentioned that in the petition a copy of the said representation upon which Mrs. Augustine was basing her claim in the application had been annexed. Therefore, atleast from that time onward the petitioners were aware of the representation made by Mrs. Augustine. On the 1st of September, 1976 Appeal No. 109/75 was disposed of by the First Additional District Judge who held :

“that the appeal is dismissed for non-prosecution. The order complained of is hereby affirmed.”

5. On or about 2nd of September, 1976 the said Civil Rule No. 15425 (W) of 1975 came up for hearing and was disposed of by Mr. Justice M. M. Dutt. In view of the contentions raised in this application it is necessary to set out in extenso the order of Mr. Justice M. M. Dutt.

“The petitioner Mrs. A. Augustine is a teacher of St. Agnes School, Howrah. It is not in dispute that the said school is governed by the Code of Regulation for European (Anglo-Indian) Schools in Bengal (Now West Bengal), 1929. The service of the petitioner was terminated by the respondent No. 6 who claims to be Headmistress of the school. Against the order of her termination the petitioner has submitted a written representation to the Inspector of European Schools, West Bengal. In this connection it may be stated that paragraph 4 of Chapter III of the said regulations provides as follows :

“No teacher may be dismissed either summarily or with due notice save by the Governing Body who shall in all cases of summary dismissal immediately report the fact with full particulars to the Inspector. A teacher, who considers himself or herself unjustly dismissed’ shall be permitted to make representation to the Inspector of European School Bengal and the Governing Body shall in such case defer final action until they shall have received from the Inspector an expression of his views”. The petitioner also instituted a suit challenging the order of her termination. The suit is still pending. Strictly speaking due to the pendency of the suit, the writ application is not maintainable. But Mr. Bose, learned Advocate appearing on behalf of the State of West Bengal states that the Government will see that the representation made by the petitioner to the Inspector of European Schools is disposed of in accordance with law as expeditiously as possible. The respondent

no. 1, the State of West Bengal supports the contention made on behalf of the petitioner that the Inspector of European Schools has authority to dispose of the representation made by the petitioner and that his decision will be binding upon the parties including the school authorities. On behalf of the respondent no. 6, the Headmistress, it has been argued that no writ application is maintainable for the purpose of enforcement of the said paragraph 4 of the Regulations as the Regulations have no statutory force and that they are mere executive instructions. In the suit one of the objections taken on behalf of the respondent no. 6 was that, if the petitioner felt aggrieved by the order of termination, she could prefer an appeal to the Inspector European Schools. Be that as it may, as the respondent No. 1, the State of West Bengal, is willing to have the representation made by the petitioner disposed of in accordance with law, I do not think that the technical objection to the maintainability of the writ petition will stand in the way of such disposal.

The State of West Bengal and the respondent no. 4 the Deputy Director of Public Instruction for Anglo-Indian Schools, are directed to see that the representation submitted by the petitioner against the order of her termination is disposed of within two months from date as suggested by Mr. Bose."

6. It is stated that between 15th of September, 1976 to 21st of September, 1976 the Deputy Director of Public Instructions for Anglo Indian Schools being respondent no. 2 herein by letters called upon the school authorities to appear before him with all necessary papers in connection with the termination of the services of Mrs. Augustine. It is stated that on the 27th of September, 1976, the Secretary of the School being petitioner no. 4 herein appeared before the respondent no. 4 on the 27th of September, 1976. The Secretary was directed to come again with all the relevant papers. It is stated that the Secretary informed the said respondent that all the papers had been handed over to the learned advocate of the school for filing in connection with the pending cases in Howrah Court. It is alleged that on or about 7th of January, 1977 the respondent no. 4 sent another letter to the school authority to appear before him which was replied by the school authorities by a letter dated 13th of January, 1977. The school authorities although could not produce the papers connected with the termination of the service of Mrs. Augustine the Secretary of the school, however forwarded a copy of the order passed by the learned Fourth Munsif, Howrah refusing to pass the interim order of injunction as prayed for by Mrs. Augustine in the suit filed by her. On or about 24th of February, 1977 the respondent no. 4 who is Deputy Director of Public Instruction (Anglo Indian School, West Bengal) by a letter requested the Secretary of the Governing Body of the school to appear before him for hearing along with the relevant papers connected

with the termination of the services of Mrs. Augustine including the Minute Book of the Governing Body on 2nd of March, 1977 at 12-15 p. m. It was further stated that in case of non-compliance hearing would be taken up ex-parte for expression of views on the matter of termination of services of Mrs. Augustine. The Secretary of the school, on or about 2nd of March, 1977 in reply to the letter dated 24th of February, 1977 informed the respondent no. 4 that no copy of the representation made by Mrs. Augustine had yet been served upon the institution and as such the school authorities were not in a position to submit any effective objection. Without prejudice however to the preliminary objection that the decision of the Governing Body not being an ex-parte one no appeal lay against the said decision, the respondent no. 4 was requested by the petitioners to advise Mrs. Augustine to serve a copy of the representation to the school authorities. This seems to me to be purposeless because as I have mentioned before in the petition filed before the High Court under Article 226 of the Constitution a copy of such representation had been annexed. The said respondent was further requested to stay his hands in the matter till a copy of the said representation was served. It is the case of the petitioners that the same letter date 22nd of March, 1977 was delivered by Peon Book on the same day and the respondent no. 4 had received it before the time fixed for hearing, It is stated that a copy of the said letter was also sent by Registered A/D. The said respondent however did not send any reply to the said letter. It is the case of the petitioner that there is no denial that the letter dated 22nd of March, 1977 was served and received by the respondent no. 4 before the time for hearing fixed by him on the 22nd of March, 1977. On the 22nd of March, 1977 respondent no. 4 by a letter forward a copy of the memorandum dated 18th of March, 1977 containing his views with regard to the termination of the services of Mrs. Augustine. The said respondent held, *inter alia* as follows :

“considering the fact and circumstances of the case it appears that adequate opportunity for self defence was not given to Mrs. Augustine before dismissal was ordered.”

The management does not appear to be fair in their dealings with a teacher of the school who had been serving the institution since January 1970. In view of the facts of the case I express this view that the suspension of Mrs. Augustine followed by dismissal by the school management has not been fair and not done strictly according to rules.”

7. On or about 29th of March, 1977 the Secretary of the School by a letter to the respondent no. 4 acknowledged receipt of his letter dated 21st of March, 1977. In that letter complaint was made on behalf of the petitioners that no action had been taken to serve upon the institution any copy of the representation made before the respondent no. 4 by Mrs. Augustine. As I have mentioned before strictly and formally that

assertion of the petitioners may be correct but the petitioners were aware or should have been aware of the representation made by Mrs. Augustine to the respondent no. 4 in view of the fact that a copy of the representation had been annexed with the petition under Article 226 of the Constitution filed by Mrs. Augustine before the High Court. The petitioners in that letter dated 29th of March, 1977, however, contended that an ex-parte view had been taken without giving due opportunity to the petitioners as prayed for in violation of principles of natural justice. The petitioners further contended that the matter was subjudice in a competent Court of Law and the case had not been withdrawn from the Howrah Court by Mrs. Augustine. The petitioners further stated the matter would be placed before the Governing Body of the Institution for necessary direction. It is alleged by the petitioners that on or about 4th of April, 1977, 5th of April, 1977 and 6th of April 1977 Mrs. Augustine forced her entry into the school premises, took the teachers' attendance register and made an entry of her name in the register without the permission of the school authorities. She also stayed inside the school premises it was alleged throughout the working hours causing disturbance in the normal function of the school. On or about 6th of April, 1977 an emergency meeting of the Governing Body of the school was held at the School premises to consider the memorandum of the Deputy Director of Public Instructions (Anglo-Indian Schools, West Bengal) and the report of what the petitioners described as unseemly conduct of Mrs. Augustine in the school premises on the 4th, 5th and 6th of April, 1977. It is alleged that between 16th of April, 1977 and January, 1978, several proceedings were initiated in the Civil and Criminal Courts, Howrah in respect of the alleged illegal and forceable entry of Mrs. Augustine in the school premises. The school authorities filed Title Suit No. 71 of 1977 against Mrs. Augustine and moved an application for interim injunction restraining Mrs. Augustine from entering into the school premises. No ad-interim order was, however, passed and direction for filing affidavits was given and notice to show cause was issued. It is further alleged by the petitioners that one Sree Ramanand the Durwan of the school was assaulted by Mrs. Augustine for which it was further alleged that he had to be hospitalised in the Howrah General Hospital. The said Sree Ramanand filed a criminal case against Mr. Augustine under Sections 323/325/503. In the application filed by Mrs. Augustine under Section 144 Criminal procedure Code the Executive Magistrate, Howrah was pleased to pass an order for status quo, namely, to allow free ingress and egress on 22nd of January, 1978. However, upon hearing the parties the said order of status quo was vacated on 31st of January, 1978. On 31st of October 1977 the Assistant Inspector of Schools, Sree K.M. Parvat, respondent no. 5 by a letter informed the Head Mistress of the school that he would be visiting the school on 4th November, 1977 for inspection and directed certain records to be kept

ready. On the 1st of November, 1977 the Deputy Director of Public Instructions by a letter to the Head Mistress of the School informed that he had been directed to advise the Head Mistress to re-instate Mrs. Augustine in her post as a teacher of the school immediately. The Head Mistress was also requested to report to his office immediately about the action taken in this regard. On the 4th of November, 1977, respondent no. 5 the Assistant Inspector of Anglo Indian Schools visited the school. As good deal has been made of the report that he had made, it would be necessary to refer to that report which has been annexed to the affidavit of Kailash Nath Parvat affirmed on the 4th of April, 1978 and filed in this proceedings. In the said report after setting out what he stated to be rules that recognised and aided Anglo Indian Schools were required to follow Sree Parvat stated in his report that there was no regular Head Mistress of the School at the time when he visited the school. He further stated that Rev. Sr. Anthony could not inform him clearly anything about the Governing Body. The acting Head Mistress was alleged to have informed respondent no. 5 that the latest date of the reconstitution of the Governing Body given by her was October, 1956. It is, further, alleged that the acting Head Mistress could not produce the Minute Book of the Governing Body for the last 5 years because the same was in the custody of the Howrah Munsif Court IV, since the case regarding Mrs. Augustine's dismissal was pending there. She, however, showed to the Inspector a small register which according to her was the present Minute Book of the Governing Body. According to the Inspector in the said Minute Book the resolution of only three meetings were recorded and the dates of those meetings were 15th of February, 1976 7th of April, 1977 and 27th of June, 1977. The names of the members of the Governing Body were also indicated to the Inspector. It was further indicated that from the Minute Book that names of all the members had been recorded on the dates of the meeting by one person and at the end Rev. Fr. Versatraeton has signed. It is alleged that in the Minute Book the members of the Governing Body did not seem to have signed their presence in the meeting. According to the Inspector meetings of the Governing Body were not held regularly and there was a gap of more than a year between the two meetings dated 15th of February, 1976 and 6th of April, 1977. According to the Inspector there should have been at least four meetings according to the Code of Regulations for Anglo Indian Schools between February, 1976 and April, 1977. The Inspector further complained that no procedure was followed for reconstitution of the Governing Body. According to the Inspector there has been frequent changes of the Heads of the school after 1973. In 1974 Rev. Sr. Joseph was transferred to St. Joseph's School, Matigara. She had been the Principal and Secretary to the school for quite a long time. After she left, according to the Inspector there was no stability in the post of

Principal (Headmistress). The latest Headmistress was Rev. Sr Dorothy Andam who was on long sick leave. It was alleged by the Inspector that there was a strong belief among some of the senior teachers of the school that Sr. Anthony was responsible for frequent changes of Headmistress and since the reopening of the school after Summer Vacation in June, 1977, Rev. Sr. Anthony had assumed charge of the school as Acting Headmistress. In the said report the inspector further, *interalia*, stated as follows :

“As regards the qualification of Rev. Sr. T. Anthony she stated on the date of inspection that she is a—Senior Cambridge and after that she did her teachers training course. It is, thus clear that she does not possess proper qualifications to become the Headmistress of the school. However, it has to be admitted that Sr. T. Anthony is a competent and capable lady leaving aside the question of her proper qualification to hold the post of a Headmistress of a high school or even to be senior teacher in top classes of a High School. She is soft spoken, gentle and very intelligent. Teaching staff: The names and qualifications of teachers are enclosed hereto. Of the 28 teachers who are drawing Government Dearness allowance only 14 appear to have undergone teachers training course which amounts to 50% of the staff only. As per rules at least 75% teachers must be trained in order to get recognition. It is thus expected that a recognised school — should maintain at least 75% trained staff if it is not possible to have all the teachers trained. There is no dearth of Teachers Training Colleges in Calcutta and Howrah now.

8. It has been found in course of inspection of the school that the teachers of the school are divided into two groups. Majority of teachers who are either new or less qualified or less experienced are promanagement. Some of the teachers who are more qualified or more experienced seems to be very critical of the school authorities, particularly Rev. Sr. T. Anthony who is the Secretary of the Governing Body and Acting Headmistress of the school at present. Such teachers feel that there should be a properly qualified and experienced headmistress in the school or alternatively a Government Officer should be appointed as Administrator of the school, so that the state of affairs in the school can be improved.

General Discipline: St. Agnes' Convent School has been always famous for its discipline among the students. Although, it cannot be very emphatically said that there is no discipline among the students & staff, it seems to be evident that general discipline of students & staff has deteriorated perhaps due to absence of a proper Headmistress and groupism among the teachers. It will be better for this prestigious Institution if immediate steps are taken to see that general discipline does not further deteriorate.

Provident Fund of teachers : The school authorities maintain separate Pass Books at the Local Post Office for depositing the contribution of Provident Funds of teachers. These Pass Books were checked and it was found that Provident Fund money upto October, 1977 is deposited.

Attendance Registers for the teachers : The school authorities maintain Attendance Registers for teachers. Mrs. A. Augustine has signed attendance Register on 4th April, 1977 and on 8th and 9th August, 1977. According to the Acting Headmistress, Mrs. Augustine did not come to school on 8th August but on 9th August, 1977 she got the Attendance Register and signed for both the 8th and 9th August, 1977 by force. The Acting Head Mistress also reported that Mrs. Augustine does not come to school regularly but whenever she comes she creates troubles here. The Attendance Register is not kept in the school office to prevent Mrs. Augustine from signing her name.

9. On the date of inspection that is on 4th November 1977 no current Teachers' Attendance Register was available. It is doubtful whether the teachers Attendance Register is regularly marked. It is believed that teachers are asked to sign Attendance Register for many days on a particular day. This information is based on oral statement of some teachers who like to be unidentified.

10. Class Teacher of Mrs. Augustine's daughter : Miss Elizabeth Augustine i.e., Mrs. Augustine's daughter is in class IV-B. Miss Neelam Sukla is her class teacher. It is believed that Mrs. Augustine directs her daughter to behave with teachers improperly so that some confusion may arise and she can get chances of scolding teachers. Miss Sukla reported that at least on one occasion she got fainted in the school due to troubles created by Mrs. Augustine. Majority of teachers reported that they are scared of Mrs. Augustine and her daughter. They do not like to talk with Mrs. Augustine or be the class teacher of her daughter's class. Mrs. A. Augustine : Majority of teachers does not like Mrs. Augustine's joining the school. But some of the senior teachers feel that Mrs. Augustine's re-instatement will pave way for security of services of other teachers and therefore they feel that the Government should do something for Mrs. Augustine so that she can be immediately allowed to resume her duties in the school. Although Mrs. Augustine does not seem to be a soft spoken and very well-behaved lady as per the statements of many teachers of St. Agnes' School, it is reported perhaps because such teachers may be acting under the direction of the school authorities to report to me in this way so that the Government may not be very sympathetic with Mrs. A. Augustine. However, it may not be ruled out that Mrs. Augustine is not a hot-tempered lady. But it does not mean that a hot tempered person should be unnecessarily blamed and be dismissed. In such cases it is the nature of the person that is at fault and the person

concerned should be approached friendly and sympathetically otherwise the things take undesirable trend of which the present case may be a model example.

11. To sum up it may be stated that the constitution and functioning of the Governing Body of St. Agnes' School, Howrah do not seem to be fully regular, methodical and strictly as per rules. To certain extent it appears to be in the hands of a few selected persons who are most probably managing the school in the name of the Governing Body. It could not be ascertained from documents available whether these few persons are duly authorised to act so. There seems to be some clear grounds on which steps may be taken to regularise the state of affairs in the school in which three points (1) Proper constitution of the Governing Body, (2) Proper functioning of the Governing Body with regular meetings, (3) proper maintenance of records of presence of members and minutes of the meetings of the Governing Body appear to be most important.

12. I would like to end this report by stating clearly that these are my findings based on personal understanding of the situation and also on reports that I could gather from teachers without any prejudice to any one concerned. I would also like to express my sincere thanks for sincere co-operation that Rev. Sr. Anthony extended to me during inspection."

13. As mentioned hereinbefore respondent no. 5 submitted a report recommending to take steps to regularise the state of affairs on..... (1) Proper constitution of the Governing Body, (2) Proper Functioning of the Governing Body with regular meeting and (3) Proper Maintenance of records of presence of members and minutes of the meeting of the Governing Body. According to the petitioners the copy of the said report was however not sent to the school at any time prior to this application. The Secretary of the school however on the 18th of November, 1977 informed the respondent no. 4 that his letter would be placed before the Governing Body for consideration. It was further alleged that the services of Mrs. Augustine were not terminated by way of dismissal. A copy of the letter dated 10th of November, 1977 addressed to Mrs. Augustine was also forwarded to respondent No. 4. On the 23rd of December 1977 the Director of Public Instruction by a letter called upon the Headmistress of the school to show cause as to why the Government Dearness Allowance, paid to the school should not be stopped and the recognition of the school should not be withdrawn for non-compliance with the directions given by the Government. The school was closed for Christmas Vacation from the 24th of December, 1977. On or about 4th of January, 1978 the Secretary of the school made a representation to the Minister-in-charge stating all the facts with a request to direct the D.P.I. to stay all ex-parte proceedings so far as taken against the school till the decision about the

propriety of the action was taken by the Governing Body which was subjudice. The Deputy Director of Public Instruction for Anglo Indian Schools informed the Headmistress on the 5th of January, 1978 that the Government has decided to stop the dearness allowances paid to the school due to non-compliance of instructions issued from his office. The Headmistress was advised not to submit any Government dearness allowances bill to the office. On the 31st of January, 1978 the Secretary of the school by a letter written by her lawyer submitted that St. Agnes's Convent School was established, run and administered by a minority community. The order and/or directions dated 1st of November, 1977, 23rd of December, 1977 and 5th of January, 1978 were violative of Article 30 of the Constitution. The respondent no. 4 was, therefore, requested to withdraw and/or rescind the said order and/or directions forthwith. It was further stated that in the event the Deputy Director of Public Instruction did not act as per the said letter an application under Article 226 of the Constitution would be moved in this High Court for redress. On the 16th of February, 1978 the Deputy Director of Public Instruction sent a circular to the school, whereby the Headmistress was requested to send the dearness allowances bill for the period ending 28th of February, 1978. It is further alleged that the Headmistress sent the dearness allowances bill in duplicate on or about 21st of February 1978 and although dearness allowances for teaching and non-teaching staff of the school is remitted to the school ordinarily towards the end of the relevant quarter, yet no payment had been made to the school of the petitioners.

14. It is alleged that on the 17th of March, 1978 one officer of the Education Department along with Sri K. N. Parvat, came to the school with the copy of the order dated 17th of March, 1978. It is further alleged that the said order was shown to the Secretary of the School who read the said order but did not and could not according to the petitioners receive the same because it was not addressed to the Managing Committee. I have set out the said order in the beginning of this judgment. The 18th of March, 1978 was a holiday for the successful results of the candidates sent by the school for Indian School Leaving Certificate Examination. A letter was sent on the 18th of March, 1978 which was a Saturday to the Deputy Secretary, Education Department to withdraw and/or rescind the order. It is alleged that on that same date Sri K. N. Parvat in spite of receiving the said letter sent the letter to the school through the peon and the same was handed over to the Durwan of the school at about 8 p.m. in the evening. On the following Monday on the 20th of March, 1978 this application under Article 226 of the Constitution was moved before me and I had granted an interim order of injunction staying further action in respect of the impugned order.

15. Before I deal with the rival contentions in this case it would be relevant to refer to certain other facts. As I have mentioned the

petitioners have relied on the affidavit of Lawrence Cardinal Picachy, sworn on the 18th of April, 1978. He is the Roman Catholic Archbishop of Calcutta. He states in his affidavit as follows :

"1. "I say that I am the Roman Catholic Archbishop of Calcutta. I know about and am conversent with the constitutions and functions of all the religious congregation professing the Catholic faith operating in the State of West Bengal including that of the Daughters of the Cross. All these religious congregations are constituted and function according to Canon Law i. e. Laws of the Roman Catholic Church.

2. The Daughters of the Cross is a Religious Congregation (Society) of the Roman Catholic Church, constituted and governed in accordance with Canon Law i. e. Laws of the Roman Catholic Church.

3. I say that in accordance with Canon Law, the authority over the members of a religious congregation and its various institutions of any particular territory is exercised for the said territory by a superior appointed by the Superior General of the whole Congregation.

4. I say that in the case of the religious congregation of the Daughters of the Cross, all the members of the Congregation, and all its institutions in West Bengal are directly under the Jurisdiction of the Sister Provincial of Calcutta, who is appointed for a fixed period by the Superior General of the whole Congregation.

5. I say that St. Agnes, School, Howrah, being one of the Educational Institutions constituted and run by the Daughters of the Cross, and situated within the jurisdiction of the Sister Provincial of Calcutta, the ultimate power of administration of the said school is vested in the Sister Provincial.

6. I further say that the said Sister Provincial in exercise of power and/or authority vested in her, is empowered to constitute the Managing Committee of the School by nominating its members and fill up vacancies as may occur due to death or otherwise by nominating new members. The said Managing Committee is to administer the school in accordance with the direction and final supervision of the said Sister Provincial."

16. I need not refer to the affidavit of Mrs. Augustine who has bitterly complained in her affidavit about internal politics in the school and the alleged autocratic manner in which Rev. Sr. T. Antony conducts the affairs of the school. According to her the senior teachers of the school are terrified and terrorised by Rev. Sr. T. Antony. She also denies the alleged incidence of fighting which resulted in her alleged dismissal. She says that there is no properly constituted Governing Body and this Rev. Sr. and some group of people who were monopolising the affairs of the school. She has also controverted the allegation about her

daughter. Before entering into any controversy I wish to make it quite clear that I have personally seen the class report of Mrs. Augustine's daughter. She is a child with an excellent record of both academic potentialities and good manners. The remarks of her teacher about her moral conduct are excellent. I wish and I hope irrespective of the result of this application she would be kept out of this controversy.

17. The other aspect to which I must refer is the Code of Regulations for European (now Anglo-Indian) Schools in Bengal (now West Bengal). My attention has not been drawn to any regulations or statutory powers entitling the making of the said code. Chapter II of the said code deals with the Governing Body, Chapter III deals with the employment of teachers and Chapter IV deals with the grades of the school. The said code so far as the Governing Body is concerned provides as follows :

"1. Every school to which aid is given shall be under the management of a Governing Body, duly constituted and acting under definite rules which the Department may demand to have submitted for approval.

2. The management of the business and affairs of the school shall be vested in the Governing Body.

3. Meetings shall be duly called and held at least once every quarter.

Note—The rules should expressly state how meetings are called, as well as the procedure to be followed at such meetings.

4. Rules shall be drawn up to provide a method by which governors shall be chosen and from time to time removed or replaced.

5. The Governing body shall have power—

(a) to make rules from time to time for their own guidance not inconsistent with the terms of this Chapter ;

(b) to delegate, subject to such conditions as they think fit, any of their powers to sub-committees consisting of such members as they shall think fit, and to make such regulations as to the proceedings of such sub-committees as may seem expedient ;

(c) to make and enforce all rules in their opinion necessary or expedient for the management and control of the school in all its departments, including any hostel or hostels that may be established in connection with the school ;

(d) to appoint and to remove a Secretary, and

(e) to appoint and to dismiss school teachers, boarding-masters, matrons sergeants, clerks and servants in the employ of the school, and to fix the remuneration to be paid to them.

6. The Secretary shall cause true accounts to be kept of the moneys received or expended by the school, and matters in respect of which such receipt and expenditure takes place, and of the assets, credits of liabilities of the school.

7. The accounts shall be closed on the 31st day of March in each year, and shall be subjected to such audit as the Governing Body may determine and the Department require.

8. It shall be the duty of the Secretary, at stated time, to lay before the Governors a clear and complete statement of the accounts of the school.

9. It shall be within the competence of the Governing Body to appoint one of their members to be visiting Governor of the school and to frame such regulations as to his functions and powers as they shall consider necessary or expedient.

10. The Governing Body shall frame such rules to define the powers of the head teacher as may seem necessary.

11. The Governing Body shall frame such rules to define the duties of the Secretary as may seem necessary or expedient.

12. The Secretary shall in every case be approved by the Departments.

13. In communicating with the Department the Secretary shall invariably address the Inspector.

14. It shall be the duty of the head teacher to address the Inspector in all matters relating to the educational welfare of the school, and in such other matters as the rules of the Governing Body include in the powers of the head teacher."

Rules 3 and 4 of the Chapter III as amended provide as follows :

"3. No teacher may be dismissed either summarily or with due notice save by the Governing Body, who shall in all cases of dismissal immediately report the fact with full particulars to the Inspector. A teacher who considers himself or herself unjustly dismissed shall be permitted to make a representation to the Inspector of European Schools, Bengal, and the Governing Body shall in such a case defer final action until they have received from the Inspector an expression of his views.

4. The Governing Body shall immediately report to the Inspector the name of any teacher who wilfully breaks the existing written agreement."

18. It may also be mentioned that Association of Christian Schools have framed certain rules and regulations for their affairs and these have been incorporated as special rules for the management of secondary schools established and run by the Christian Church Missionary Societies or Religious Societies. This has been done under the powers given under rule 8 of the Rules of Management recognised non-Government Institutions (Aided and unaided) 1969 framed under the West Bengal Board of Secondary Education Act, 1963. It may however be mentioned that school of the petitioners is not one of the schools mentioned in that association.— Therefore, I need not consider the said regulations in any detail.

19. In the background of the aforesaid facts it is, therefore, necessary to consider (i) whether the action of the respondents in passing the order dated 17th of March, 1978 in appointing an Administrator, in the facts and circumstances of this case was legal, competent and justified ? (ii) was the order or the steps taken on behalf of the respondents to stop the dearness allowance paid to the teachers for non-compliance with the directions given by the respondents to the petitioners justified ? (iii) were the respondents competent in the facts and in the circumstances of the case and in the background of previous decision of the High Court to order reinstatement of Mrs. Augustine ?

20. The controversy in this case will have to be adjudged in the light of certain constitutional provisions. Article 29 of the Constitution affords protection of certain cultural and educational rights of the minorities. The question involved in this case does not involve any detailed examination of Article 29 of the Constitution. The main basis of the claim of the petitioners will have to be adjudged in the light of Article 30 of the Constitution which is to the following effect :

“Rights of minorities to establish and administer educational institution :

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”

21. Article 337 of the Constitution which deals with special provision with respect to educational grants for the benefit of Anglo Indian community and is to the following effect :

“337. During the first three financial years after the commencement of this Constitution, the same grants, if any, shall be made by the Union and by each State for the benefit of the Anglo-Indian Community in respect of education as were made in the financial year ending on the thirty-first day of March, 1948.

During every succeeding period of three years the grants may be less by ten percent than those for the immediately preceding period of three years ; Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian Community shall cease : Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.”

22. It may be mentioned that in this case I am not also concerned

with any question of infringement of Article 337 of the Constitution. Article 30 protects the rights of the minorities based on religion or language to establish as well as to administer educational institutions of their choice. The right is two fold as has been explained in several decisions of the Supreme Court. The right is to establish and further right is to administer educational institutions of their choice. Such institutions, however, need not be confined to the children of the minority community indeed it has been reiterated by the Supreme Court that it is in connection with the outside world that the excellence of the children of the minority community and of their culture can best be developed. The right in clause (1) of Article 30 also is not limited to the manner in which such educational institutions should be administered nor as I have mentioned before the right is to the educational institutions where predominantly children of minority community are educated or trained. At one point of time a doubt had arisen in my mind as to whether Article 30 was to protect only the minority community in maintaining its own linguistic or religious identity and therefore must be confined to the institutions where predominantly children of the minority community are educated. But in view of the language used in that article of the Constitution and in view of the decisions of the Supreme Court it appears to me that the framers of our Constitution in their wisdom had given to the minority communities, linguistic and religious right to administer exclusively without interference educational institutions of their choice even though the said institutions cater for predominantly the children of the majority community. That right flows from the clear language used in clause (1) of Article 30 of the Constitution. Clause (1) of Article 30 does not restrict the right to administer educational institutions of their choice where only children of the minority communities are educated. It is, further, necessary to bear in mind that I am not concerned in this application with the validity or invalidity of any legislative action taken by the Government. Nor am I concerned with the action of the Government taken pursuant to any statutory power. As I have mentioned before the code has no statutory force. At least my attention has not been drawn to any statutory sanction for the said code. Even if the same is treated as customary law in force at the time of coming into operation of the Constitution and as such law in terms of Articles 13 and 372 of the Constitution I have found nothing in the said code which authorise the Government or the State to appoint and administer in the contingencies that have happened or to direct reinstatement of any teacher in the situation that has arisen in this case. Therefore, as I have mentioned before I am not concerned with any statutory power or the exercise of any statutory power.

23. That however does not debar the Government in exercise of its executive power to take action in appropriate cases necessary for the

protection of the welfare of the community. The Supreme Court in the case of (1) *Ram Jawaya v. State of Punjab*, AIR 1955 SC page 549 has held, that the functions of a modern State like the police States of old are not confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community, even without any legislative sanction. There the Supreme Court was concerned with the Government's action in taking upon themselves the right of selection to the printing and publishing of school text books and such right was recognised. Therefore, the action impugned in this application under Article 226 of the Constitution though executive in nature will have to be adjudged in the light of the principles under Article 30 of the Constitution.

24. Necessarily, one has to refer to the root cause namely the decision of the Supreme Court in the case of (2) *In re Kerala Education Bill* 1957, AIR 1958 SC 956. I am not concerned to examine whether any question of infringement of Article 14 of the constitution arises in this case nor am I concerned with the scope of Article 143 of the constitution under which the reference was made. There under Article 143 the President had referred to the Supreme Court for consideration and report on the following questions :

(1) Does sub-cl. (5) of cl. 3 of the Kerala Education Bill, read with cl. 36 thereof or any of the provisions of the said sub-clause, offend Art. 14 of the Constitution in any particulars, or to any extent ?

(2) Do sub-cl. (5) of cl. 3, sub-cl. 3 of cl. 8 and cls. 9 to 13 of the Kerala Education Bill, or any provisions thereof, offend cl. (1) of Art. 30 of the Constitution in any particulars or to any extent ?

(3) Does cl. 15 of the Kerala Education Bill, or any provisions thereof, offend art. 14 of the Constitution in any particulars or to any extent ?

(4) Does cl. 33 of the Kerala Education Bill, or any provisions thereof, offend Art. 226 of the Constitution in any particular or to any extent ?

25. So far as question no. (1) was concerned it was by the majority held that clause 3(5) read with clause 36 did not offend Article 14 of the Constitution in any particular or to any extent. It was held by majority that clause 3(b), clause 8(3) and clauses 9 to 13 offended Article 30(1) of the Constitution, so far as Anglo-Indian Educational Institutions entitled to grant under Article 337 of the Constitution are concerned. As regards other minorities not entitled to grant as of right under any express provision of the Constitution, but on receipt of aid or desirous of such aid and also as regards Anglo Indian Educational

Institutions in so far as they were receiving aid in excess of what were due to them under Article 337, clauses 8(3) and 9 to 13 did not offend Article 30(1) but clause 3(5) in so far as it made such educational institutions subject to clauses 14 and 15 did offend Article 30 of the Constitution Clause 7 (except sub-clauses 1 & 3 which applied only to aided schools) and clause 10 so far as these applied to recognised school to be established after the said bill came into force did not offend Article 30(1) but clause 3(5) in so far as it made the new schools established after the commencement of the Bill subject to clause 20 did offend Article 30(1). I am not concerned with the different clauses of the Kerala Education Bill, 1957 as I have mentioned before I am not concerned in this application with the validity or invalidity of any legislative action but it may be instructive in view of the controversy raised before me to refer to certain observations of the Supreme Court appearing at pages 982 to 984 of the report, The Supreme Court observed—

“(30) Learned Counsel appearing for the State of Kerala advances the extreme contention that Art. 30(1) confers on the minorities the fundamental right to establish and administer educational institutions of their choice and nothing more. They are free to exercise such rights as much as they like and as long as they care to do so on their own resources. But this fundamental right goes no further and cannot possibly extend to their getting financial assistance from the coffers of the State. If they desire or seek to obtain aid from the State, they must submit to the terms on which the State offers aid to all other educational institutions established by other people just as a person will have to pay 15 naye paise if he wants to buy a stamp for an inland letter. Learned Counsel appearing for the two Anglo-Indian schools as well as learned Counsel appearing for the Jamait-ul-ulem-i-Hind, on the other hand, insist in their turn, on an equally extreme proposition, namely, that their clients’ fundamental rights under Art. 30(1) are in terms, absolute and not only can it not be taken away but cannot even be abridged to any extent. They draw our attention first to Art. 19(1)(g) which confers on the citizens the fundamental right to carry on any business and then to Cl. 6 of that article which permits reasonable restrictions being imposed on that fundamental right and they contend that, as there is no such provision in Art. 30(1) conferring on the State any police power authorising the imposition of social control, the fundamental rights under Art. 30(1) must be held to be absolute and cannot be subjected to any restriction whatever. They reinforce their arguments by relying on Arts. 28(3), 29(2) and 30(2) which, they rightly submit, do contemplate the grant of aid to educational institutions established by minority communities. Learned Counsel also strongly rely on arts. 41 and 46 of the Constitution which as directive principles of State policy, make it the

duty of the State to aid educational institutions and to promote the educational interests of the minorities and the weaker sections of the people. Granting of aid to educational institutions is, according to learned Counsel, the normal function of the Government. The Constitution contemplates institutions wholly maintained by the State, as also institutions receiving aid from the State. If, therefore, the granting of aid is a governmental function, it must, they say, be discharged in a reasonable way and without infringing the fundamental rights of the minorities. There may be no fundamental right given to any person or body administering an educational institution to get aid from the State and indeed if the State has not sufficient funds it cannot distribute any. Nevertheless, if the State does distribute aid it cannot, they contend, attach such conditions to it as will deprive the minorities of their fundamental rights under Art. 30(1). Attaching stringent conditions, such as those provided by the said Bill and summarised above, is violative of the rights guaranteed to the minorities by Art. 30(1). Surrender of fundamental rights cannot, they conclude, be exacted as the price of aid doled out by the State.

26. We have already observed that Art. 30(1) gives two rights to the minorities. (1) to establish and (2) to administer, educational institutions of their choice. The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided. Learned Attorney-General concedes that reasonable regulations may certainly be imposed by the State as a condition for aid or even for recognition. There is no right in any minority, other than Anglo-Indians, to get aid, but, he contends, that if the State chooses to grant aid then it must not say—“I have money and I shall distribute aid but I shall not give you any aid unless you surrender to me your right of administration.” The State must not grant aid in such manner as will take away the fundamental right of the minority community under Art. 30(1). • Shri G. S. Pathak appearing for some of the institutions opposing the Bill agrees that it is open to the State to lay down conditions for recognition, namely, that an institution must have a particular amount of funds or properties or number of students or standard of education and so forth and it is open to the State to make a law prescribing conditions

for such recognition or aid provided, however, that such law is constitutional and does not infringe any fundamental right of the minorities. Recognition and grant of aid, says Shri G. S. Pathak, is the governmental function and, therefore, the state cannot impose terms as condition precedent to the grant of recognition or aid which will be violative of Art. 30(1). According to the statement of case filed by the State of Kerala, every Christian school in the State is aided by the State. Therefore, the conditions imposed by the said Bill on aided institutions established and administered by minority communities, like the Christians, including the Anglo-Indian Community, will lead to the closing down of all these aided schools unless they are agreeable to surrender their fundamental right of management. No educational institution can in actual practice be carried on without aid from the State and if they will not get it unless they surrender their rights they will, by compulsion of financial necessities, be compelled to give up their rights under Art. 30(1). The legislative powers conferred on the legislature of the States by Arts. 245 and 246 are subject to the other provisions of the Constitution and certainly to the provisions of Part III which confers fundamental rights which are, therefore, binding on the State legislature. The State legislature cannot, it is clear, disregard or override those provisions merely by employing indirect methods of achieving exactly the same result. Even the Legislature cannot do indirectly what it certainly cannot do directly.

27. It is through educational institutions that the language and script of the minority community can be preserved, improved and strengthened. It is, therefore, that Art. 30(1) confers on all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture. The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above. But the conservation of the distinct language, script or culture is not the only object of choice of the minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. But according to the Education Code now in operation to which it is permissible to refer for ascertaining the effect of the impugned provisions on existing state of affairs, the

scholars of unrecognised schools are not permitted to avail themselves of the opportunities for higher education in the University and are not eligible for entering the public services. Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Art. 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their choice is in truth and in effect to deprive them of their rights under Art. 30(1). We repeat that the legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law. According to the decisions of this Court referred to above, in judging the validity of any law regard must be had to its real intendment and affect on the rights of the aggrieved parties, rather than to its form. According to the Education Codes certain conditions are prescribed whether as legislative or as executive measures we do not stop to enquire as conditions for the grant of recognition and it is said, as it was said during the discussion on the question of aid, that the said Bill imposes no more burden than what these minority educational institutions along with those of other communities are already subjected to. As we have observed, there can be no question of the loss of a fundamental right merely by the non-exercise of it. There is no case here of any estoppel assuming that there can be any estoppel against the Constitution. Therefore, the impugned provisions of the said Bill must be considered on its merits."

28. In the case of (3) *Sidhrajibhai v. State of Gujarat*, AIR 1963 SC page 540 the Supreme Court had occasion to examine again the ambit of Article 30 of the Constitution. The Supreme Court reiterated that unlike Article 19 the fundamental freedom to establish and administer educational institutions by minorities guaranteed under clause (1) of Article 30 is absolute in terms, it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Article 19 may be restricted. All minorities, linguistic or religious, have under Article 30(1) an absolute right to establish and administer educational institutions of their choice and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void. That however is not to say that it is not open to the State to impose regulations upon the exercise of that right. The fundamental freedom is to establish and to administer educational

institutions ; it is a right to establish and administer what are in truth educational institutions ; institutions which cater to the educational needs of the citizens, or sections thereof. Regulations made in the true interests of efficiency of instruction, discipline health sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed ; they secure the proper functioning of the institutions, in matters educational. Clause (2) of Article 30 is only a phase of the non-discrimination clause of the Constitution and does not derogate from the provisions made in clause (1). This clause is moulded in terms negative the State is thereby enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institution is in the hands of the minorities, religious or linguistic but the form is not susceptible of the inference that the State is competent otherwise to discriminate so as to impose restrictions upon the—substance of the right to establish and administer educational institutions by minorities or linguistic. The Supreme Court, further, reiterated the right established by Article 30(1) was intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice and that right is intended to be effective and not to be whittled down by so called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justified—because it is in the public or national interest though not in its interest as an educational institution the right guaranteed under Article 30(1) will be of “teasing illusion a promise of unreality. Regulation which may lawfully be imposed either by legislative grant or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test, the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. There the Supreme Court was examining rule 5(2) of the rules made by Bombay Government for Primary Training Colleges, and Rule 11 and 14 for recognition of Private Training Institution in so far this is related to the reservation of seats therein under orders of Bombay Government and directions given pursuant thereto.

29. The right of the minority community to set up educational institutions and administer the same is absolute as noted above. That right may be exercised by the minority community through organisation and such organisation may be society registered or un-registered. The fact

that the minority community exercises the right through registered society does not make any difference as to the content of the right. In the case just noted above the college of the minority community was run by a registered society. This point is emphasised because of the contention raised on behalf of the respondent as I shall note hereinafter.

30. In the case of (4) *W. Proost v. State of Bihar*, AIR 1969 SC page 465 the Supreme Court again reiterated that the width of Article 30(1) could not be cut down by introducing in it considerations on which Article 29(1) is based. Article 29 was a general protection which was given to the minorities to conserve their language, script or culture. Article 30 was a special right to the minority to establish educational institutions of their choice. The choice is not limited, according to the Supreme Court to institutions seeking to conserve language, script or culture and the choice is not taken away if the minority community having established an educational institution of its choice also admits members of other communities. According to the Supreme Court that is a circumstance irrelevant for the application of Article 30(1) since no such limitation is expressed and none could be implied. The Supreme Court at page 469 of the report referred to the decision of (3) *Rev. Sidhrajibhai Sabbai v. State of Gujarat* AIR 1963 SC page 540 and reiterated that the emphasis was placed in the former case not so much upon the need of the community exclusively, upon educational needs of the citizens or sections thereof.

31. The question was again examined by the Supreme Court in the case of (5) *State of Kerala v. Mother Provincial*, AIR 1970 SC page 2079. The Supreme Court was there examining Kerala University Act 9 of 1969 and the validity of certain sections. The Supreme Court reiterated that Article 30(1) contemplated two rights which were separated in point of time. The first right was the initial right to establish institutions of minority's choice. It was irrelevant that in addition to the minority community others from other minority communities or even from the majority community could take advantage of these institutions. The second part of the right according to the Supreme Court related to the administration of such institutions which means 'management, of the affairs of the institutions. This Management must be free of control so that the founders or their nominees could mould the institutions as they thought fit and in accordance with their ideas of how the interests of the community in general and the institutions in particular would be best served. There was, however, an exception that the standards of education were not part of the management as such. The minority institutions could not be allowed to fall below the standards of excellence expected of educational institutions or under the guise of exclusive right of management to decline to follow the general pattern. The Supreme Court, further reiterated in that decision that disciplinary

action is within the management function which is the exclusive preserve of the minority community.

32. In the case of (6) *D A V. College, Bhatinda v. State of Punjab*, AIR 1971 SC page 1731 the Supreme Court again examined this question. There the Supreme Court reiterated that though it is true that no linguistic minority could claim that the University should conduct its examinations in the language or script which the institutions have a right to adopt but in such a case the University must not force those institutions to compulsorily affiliate themselves and impose on them the medium of instruction. For our present purpose the decision need not be examined in any detail. All these cases were reviewed by the Supreme Court in the case of (7) *St. Xavier's College v. State of Gujarat*, AIR 1974 SC 1389. The Supreme Court reviewed all the previous decisions and examined the scope of the right under Articles 29 & 30 and reiterated that the articles created separate rights. The Supreme Court reiterated that it was permissible for the State to impose regulations in the interest of education and the Supreme Court further reiterated that the right conferred on the minorities is not an absolute right. This right is not free from regulation and the right is to administer but not to mal-administer or mis-administer or to administer institutions in such a manner which will be destructive of the principal interest of education. The Supreme Court again reiterated that the right of minority interest to administer institution implied an obligation and duty of the minority institution to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures were often required to ensure appointment of good teachers and their conditions of service. In the case of (8) *G.F. College Shahjahanpur v. Agra University*, AIR 1975 SC page 1821 the Supreme Court was examining a statute requiring that the Managing Committee of minority educational institution should include the principal of the college and the seniormost member of the teaching staff under the Agra University Statute. By majority decision the Supreme Court held that such a provision was valid. Article 30 did not invalidate provisions of regulatory character which were intended to secure the better administration of an institution, and according to the Supreme Court the principal and the senior-most teacher of the college were not outsiders, but insiders already appointed by the Governing Body and their presence on the Managing Committee would only ensure better administration of the college. Mr. Justice Mathew who delivered a dissenting judgment on this point, however, observed that the determination of the composition of the body to administer the educational institution must be left to the minority as that was the core of right to administer. Regulations to prevent maladministration by that body however were permissible. A Division Bench of the Allahabad High Court in the case of (9) *St. Joseph's H.S. School v. Ravi Shankar*, AIR 1976 Allahabad, page

390 examined the question but in view of the problem involved therein it is not necessary to examine the said decision in any great detail.

33. In the instant case I have set out the first order impugned namely, the order dated 17th of March, 1978. As I have indicated before there is no legislative authority to make the order. If the Code of Regulations for European (now Anglo Indian) Schools in Bengal as amended is considered to be such law to be enforced after the coming into operation of the Constitution then the provisions of that code do not authorise the appointment of an Administrator in the circumstances mentioned in the impugned order. Furthermore, the first ground for passing the impugned order is that there is no Governing Body duly constituted in conformity with the provision of Chapter II of the code. This, however, is not correct because Chapter II of the code only enjoins that there should be a Governing Body duly constituted and acting under definite rules which the department may demand to have submitted for approval. The Governing Body, according to the Cannon Law as appears from the affidavit of Lawrance Cardinal Picachy the Roman Catholic Archbishop of Calcutta is duly constituted and functioning. Vacancies in the Governing Body as and when they occur have been filled. Therefore, the first ground has no leg to stand. It is, further the case of the petitioners that the rules were submitted year after year to the appropriate Government Departments and were received by them and never any objections were raised.

34. The second ground mentioned in the order is that the school had failed to maintain proper records. There is no material and the officer concerned has not mentioned any material on which this finding is based. The failure to produce the minute books and other records which have been filed in the Howrah Court cannot be such a ground. The next ground is that the alleged failure to maintain the desired standard of discipline. Even the report of the Inspector maintains that the discipline of the school is exemplary. Not a letter or a scrap of paper was produced either before the Inspector or before this Court on behalf of the respondents about any complaint by any guardian or anyone else about discipline in the school. It is, therefore, a little surprising that in the context of discipline of student community in the country to-day, the Inspector should have thought it fit to make this remark about the discipline of a school of this nature. The academic performances of the students of the School have also been very good. The next ground is the failure to appoint adequate number of properly qualified teachers. It is true that, according to the Government regulation certain percentage of teachers namely 75% of teachers will have to be properly-trained. That was not done. The Government could have insisted on their proper training and give a warning to that effect. That by itself, in my opinion, does not authorise the appointment of an Administrator in the manner

done. Counsel for the respondents contended before me that the Administrator had been appointed only for a temporary period and as a regulatory measure. In the context and in the background of the facts and circumstances of this case the impugned order of appointment of Administrator would have serious consequences on the administration of the school and cannot be treated as a regulatory measure taken to ensure proper imparting of education. I am, therefore, unable to uphold the order dated 17th of March, 1978 appointing the Administrator.

35. The second order impugned in this case is the order of stopping dearness allowances. It is true that there is no fundamental right to obtain any grant from the State as such, but if other educational institutions are entitled to grant of dearness allowances, on the plea that interference in the disciplinary functioning of the Governing Body, has not been permitted by the Governing Body a right which the Supreme Court has reiterated is an exclusive right of the minority community, cannot be a ground for stoppage of dearness allowance. This would be permitting the State to do indirectly which it cannot do directly. Therefore, this order for stoppage of grant of dearness allowances on the plea of non-compliance with the direction of the Educational Directorate to reinstate Mrs. Augustine cannot also be upheld. I, therefore, direct that all arrears of due dearness allowances in accordance with the rules upto date should forthwith be cleared and paid by the Government and not later than the 15th of November, 1978.

36. The third aspect is whether the respondents have any right to direct reinstatement of Mrs. Augustine. It is true in the proceedings before this Court in Civil Rule mentioned before Mr. Justice M. M. Dutt had directed the respondent authorities to consider the matter in accordance with the law. The case of the Governing Body is that the services of Mrs. Augustine has been terminated as a disciplinary measure because of her conduct in the school in October 1974. If this is a termination then the code does not authorise the Government to direct reinstatement or to interfere. Therefore there is no law according to which the respondents were directed to—consider the representation of Mrs. Augustine, to direct her reinstatement. It is true that in this matter the Governing Body has not taken a very consistent attitude. First, their plea was that they do not know about the representation of Mrs. Augustine may not be wholly correct, because a copy of such representation was annexed with the petition made to this Court by Mrs. Augustine. In the said petition Mrs. Augustine had alleged as follows :

“I beg to inform you that on 7.10.74 Mr. A. Vulson an assistant teacher of St. Agnes Convent School wronged me with her behaviour. And soon after the incident I reported to Sister Mary Vianney, the Principal. She told me that she will look into the matter. But on 8th morning, soon after the school started, Sister Theresa Antony, one of

seven sisters residing in the school handed over a letter of suspension to Me. The letter was dated 7.10.74. I was shocked with the letter. From the letter I knew that she was the secretary of the Managing Committee. I told her that I was not guilty of suspension and also she was not the right person to give the suspension letter. She did not ask me anything about the incident nor did she allow me to talk to her. When I told about the suspension letter to the Principal she told me that she was not informed about the suspension.

I waited patiently till the school closed for winter holidays, i. e. 13th December hoping that she will withdraw the suspension. I came to your office and enquired whether any report against me was made to the office. They told me that they have not received any. Then I had no other way than going to the court for seeking justice. The 4th Munsif of Howrah Court passed an ad interim injunction on 17.12.74. Then on 19th I received a letter dated 9.12.74 from the secretary informing me that my services in the school was terminated from 1st November 1974. This is for your information and necessary action from your end.

Kindly let me know whether the school authorities informed you about my dismissal before 9.12.74 i. e. the date on which the letter of my dismissal was issued and whether they have given the full particulars for my dismissal."

37. Secondly, in the Howrah Court the plea taken on behalf of the petitioners was that if Mrs. Augustine had any grievance she should go before the Government. She, therefore, made a representation to the Government. The Government was not dealing with the representation. She therefore moved this Court. Though this point was taken before Mr. Justice Dutt that the Government had no right to interfere it seems that this point was not pressed, atleast no appeal was preferred from the said decision of Mr. Justice Dutt. Therefore, the right of the Government to deal with the representation as hold by Mr. Justice Dutt is binding on the petitioners. But Mr. Justice Dutt did not held that she got any greater right than what was given to her in the Code or what is contained in Articles 29 & 30 of the Constitution. It has been secondly held by the Supreme Court that a disciplinary matter is a management function and an exclusive right of the minority community. In the context, in my opinion, the disciplinary action taken against Mrs. Augustine cannot be interfered with by the respondents. Furthermore, Mrs. Augustine was given a hearing. The respondents were in error in holding that Mrs. Augustine had not been given any hearing.

38. Therefore, the order dated 1st November 1977 or the direction directing reinstatement of Mrs. Augustine cannot be sustained, and I hereby quash the same. But in view of the attitude taken by the petitioners I direct that the petitioners should pay to Mrs. Augustine her full salary upto the end of August, 1978 and should further pay the three months

salary due to be paid to her in lieu of the notice. All these payments should be made as early as possible and in any event not later than 1st November, 1978.

39. In the order dated 18th of March, 1977 the Deputy Director of Public Instruction has held that Mrs. Augustine had not been given a fair hearing and according to the rules. He has not referred to the infringement of any particular rule. Notice was given to Mrs. Augustine of the alleged charges. She was heard, and action was taken by a Committee of the Governing Body. There may be conflict of version as to the incidence which took place on 7th of October, 1974 and the Deputy Director of Public Instruction has not referred to any evidence of fact from which it could be inferred that the incidence complained of about Mrs. Augustine and Mrs. Vulson did not take place. If such an incident did take place within the school in the presence of the teachers and some of the students as alleged then the action taken by the petitioners was pre-eminently justified. Be that as it may in view of the rules and in view of the order of Mr. Justice M. M. Dutt of the attitude taken by the petitioners in this regard in my opinion justice of the situation would be met if Mrs. Augustine is paid the amounts I have directed as before. Sri Parvat, Assistant Inspector of Anglo-Indian schools in his report dated 14th of November, 1977 which preceded the making of the impugned order of appointment of administrator had suggested three points namely, (i) proper constitution of the Governing Body, (ii) proper functioning of the Governing Body with regular meeting and (iii) proper maintenance of records of presence of members and minutes of the meeting of the Governing Body. So far as proper constitution of the Governing Body is concerned according to the affidavit of Lawrance Cardinal Picachy, the Sister Provincial, is empowered to constitute the Managing Committee of the Schools by nominating its members and fill up vacancy as might occur due to death or otherwise by nominating new members. If the Code of Regulation for European (Now Anglo-Indian) Schools in Bengal is applicable, which is doubtful, Chapter II of the said Code only enjoins that every school to which aid is given shall be under the management of a Governing Body duly constituted and acting under definite rules which the department may demand to have submitted for approval. So far as the management of the school under a Governing Body duly constituted is concerned if the Canon Law is applicable and which seems to be the position by virtue of clause (1) of Article 30 of the Constitution then no grievance can be made on this aspect. It is also the case of the petitioners that the Governing Body had sent such constitution of the Governing Body, of the names of the members to the department concerned from time to time and no objection had been raised. This is not seriously disputed. But so far as Rule 1 of Chapter II of the Code enjoins that the Government has the right to approve the rules for the Constitution of the Governing Body

in view of the principles enunciated by the Supreme Court such requirement of approval would be repugnant to Clause (1) of Article 30 of the Constitution and cannot therefore be enforced. So far as the requirement that the Governing Body should meet regularly, I am of the opinion, that such a requirement as contemplated under Rule (2) of the Code can be sustained as a regulatory measure because Article 30 protects certain rights but does not give freedom from conformity to law. The constitutional protection under clause (1) of Article 30 does not create new privileges. It does not deprive the State of its right to legislate. Therefore, in order to ensure proper functioning of the school the Governing Body should meet as required by Rule (3) of the Code at least once every quarter. Such a rule should be incorporated by the petitioners and the Government should be informed that such rule has been so incorporated. Sri Pravat has also noted in his report that there should proper maintenance of records. These records are of the presence of the members and minutes of the meeting. This is also a salutary recommendation and such a rule should be incorporated by the petitioners in their rules. In his report the Assistant Inspector states that of 28 teachers who are drawing Government Dearness Allowance only 14 of them had undergone teachers training course which amount to 53% of the staff only. As per rules at least 75% teachers must be trained in order to get recognition. Counsel for the respondents contended that there is no fundamental right to get grants. But the Government in my opinion is competent to frame rules for grants. In the instant case if the rules for recognition require that 75% of the teachers must be trained then in my opinion the petitioners should amend their rules so as to ensure that 75% of their teachers should receive teachers training course and make arrangement for the same. But none of these deficiencies warrant the appointment of an Administrator as has been purported to be done.

40. Subject to the directions as aforesaid the rule is made absolute. Parties will pay and bear their own costs.

S.P.M.

[CIVIL APPELLATE JURISDICTION]

• Before Mr. Justice Chittatosh Mookerjee and
Mr. Justice B. C. Ray

Decision : September 11, 1978

• L. N. Birla and others

Versus

Appellants

• University of Calcutta and others

Respondents*

• West Bengal College Teachers' (Security of Service) Act, 1975, sections, 1(3)8,9,10,12,13,14 and 16—Delegation of powers under section

*F. M. A. no. 517 of 1978.

13 by the Syndicate to the vice chancellor to hear appeals preferred under section 12 of the Act, whether possible, whether syndicate derives such power of delegation from section 23(2) of the Calcutta University Act in respect of appeals preferred to the University under section 12 of the W.B. Teachers' (Security of Service) Act, 1975, Right to prefer appeals under section 12—Whether can be availed of even before the constitution of the appellate Tribunal under section 14 of the Act; Right of appeal—Whether can be taken away if the appellant has abided by the judgment or has taken advantage of something done by the opponents under the decree. Calcutta University Act, 1966, sections 4(1) and 23(2).

On the basis of a domestic enquiry, the appellants dismissed the respondents nos. 5 and 6 two teachers of the college from service against which the teachers preferred appeals to the University of Calcutta under section 12 of the West Bengal College Teachers' (security of service) Act, 1975. After a chequered career the present appellants moved the High Court under Article 226 of the constitution of India against the order of the vice chancellor staying the operation of the order of dismissal passed by the appellants. During the pendency of the said Civil Rule, the vice chancellor disposed of the two appeals preferred by the respondents nos. 5 and 6 by setting aside the order of dismissals passed by the appellants. The High Court disposed of the Rule obtained by the appellants by quashing the orders of dismissals passed against the respondents nos. 5 and 6 and all proceedings including the orders of the Vice chancellor passed upon the appeals preferred by the respondents nos. 5 and 6, on the basis inter alia that unless the appellate Tribunal under section 14 of the West Bengal College Teachers' (Security of Service) Act 1975 was set up by the State Government, the provisions of the said Act would not be given effect to inasmuch as the provisions of the Act constituted a single scheme.

The appellants preferred the instant appeal against the judgment and order passed by the Hon'ble Mr. Justice Amiya K. Mookerji, in so far as the same purported to quash the orders of dismissal passed by the appellants. The respondents also filed Memoranda of Cross-objections. Various points were urged by all parties and after a contested hearing, the Hon'ble Appeal Court.

HELD : (1) No one can be deprived of his statutory right including the right of appeal even when the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree.

(para 13)

(2) As soon as the West Bengal Teachers' (security of service) Act, 1975 came into force, the right to prefer appeals under section 12 against orders of penalties imposed under section 9 accrues to the aggrieved teacher irrespective of the constitution of an appellate Tribunal under section 14.

(para 17, 18)

(3) The University becomes competent to entertain appeals preferred

under section 12 against orders passed under section 9(1) of the Act from the date of commencement of the West Bengal Teachers' (security of service) Act, 1975. (para 21)

(4) The expression "all powers of the University not otherwise specifically provided for" in section 23(2) of the Calcutta University Act, 1966 would include not only the residuary powers of the University under the Calcutta University Act itself but also the powers of the University conferred by any other law and which have not been specifically distributed or delegated by the said law to any Officer or authority of the University. (para 27)

(5) The Syndicate of the University of Calcutta can validly delegate under section 13 to the vice chancellor the power to hear appeals under section 12 against orders of penalties passed under section 9 of the West Bengal Teachers' (Security of Service) Act, 1975. (para 27)

Cases referred to :—

- (1) *C. Beepathuma and others v. Valasori Shankaranarayana Kadombolithaya and others*, AIR 1965 SC 241
- (2) *Bhau Ram v. Baij Nath Singh*, AIR 1961 SC 1327
- (3) *Mahendra Nath Roy v. Dalaraddi Chakdar and another*, AIR 1966 Cal 285 (FB)

R. N. Bajoria, B. P. Gupta, S. K. Bageria and Padma Khaitan

	...	...for appellants
<i>D. K. De and Mrs. Supra Sircar</i>	...	.. for respondents nos. 1 to 4
<i>S. B. Bhuniya</i>	...	...for respondents nos. 5 and 6

The judgment of the Court was as follows :—

Mookerjee, J. : The appellants at the material time were the office bearers/members of the Governing Body of the Birla College of Science and Education (hereinafter called the College) which was affiliated to the Calcutta University.

2. On March 17, 1977, the Principal of the said College had made a written complaint against the respondents 5 and 6 regarding an alleged incident dated March 15, 1977. According to the appellants the Governing Body of the College by a resolution dated May 24, 1977 had resolved to initiate an enquiry against the respondents 5 and 6 on the basis of the said complaint of the Principal of the College. It is further alleged that the Honorary Secretary of the Governing Body in pursuance of the alleged directions of the Governing body had issued show cause notice upon the respondents 5 and 6. A Board of Enquiry was also purported to be appointed to enquire and submit a report in respect of the allegations and the charges framed against the respondents 5 and 6. It is not necessary for our present purpose to refer to the correspondence between the appellants and the respondents in respect of the said purported enquiry. According to the appellants, on September 28,

1977, the Board of Enquiry submitted a report against the respondents 5 and 6. On September 30, 1977 the findings of the Board of Enquiry were placed before a meeting of the Governing Body of the College. The Governing Body accepted the said findings and resolved that the penalties of dismissal from service be imposed upon the respondents 5 and 6 on the ground of their being engaged in activities prejudicial to the academic interests of the College. On September 30, 1977 the Secretary of the Governing Body of the College had communicated the said dismissal orders to the respondents 5 and 6. The respondents 5 and 6, against the said dismissal orders, had purported to prefer appeals to the University of Calcutta under Section 12 of the West Bengal College Teachers' (Security of Service) Act, 1975 (hereinafter called the Act).

3. According to the respondents, the Syndicate of the Calcutta University had delegated to the Vice Chancellor of the University the authority to hear the said appeals preferred by the respondents 5 and 6 against their dismissal from service. On September 30, 1977, on the representation of the General Secretary of the West Bengal College and University Teachers Association, the Vice Chancellor of the Calcutta University had stayed the orders of dismissal of the respondents 5 and 6 till the University had looked into the matter. On October 3, 1977 the Inspector of Colleges, University of Calcutta conveyed the said order to the Honorary Secretary of the governing body of the College. The present appellants being aggrieved, by the said order of stay granted by the Vice Chancellor, Calcutta University moved this Court under Article 226 of the Constitution of India and obtained Civil Rule No. 6422(W) of 1977. The respondents contested the said Rule.

4. On January 4, 1978 Amiya Kumar Mookerji J. made Civil Rule No. 6422 (W) of 1977 absolute on the ground that the order of stay dated September 30, 1977 was passed in breach of the principles of natural justice inasmuch as no hearing was given to the College Authorities or the teachers concerned before the passing of the said order. But the learned Judge further held that the University had power to grant stay of the order appealed against by the teachers under Section 12(2) of the above Act. The learned Judge observed that nothing would prevent the University from passing fresh orders with regard to the appeals of the respondents 5 and 6 in compliance with Section 12 (2) of the West Bengal College Teachers' (Security of Service) Act, 1975. The present appellants have preferred an appeal under Clause 15 of the Letters Patent against the said judgment of Amiya Kumar Mookerji J. in Civil Rule No. 6422 (W) of 1977 and the same is still pending.

5. On January 5, 1978 the Inspector of Colleges, Calcutta University addressed a letter to the Honorary Secretary of Birla College of Science and Education *inter alia*, stating that he had been directed by the Vice Chancellor, Calcutta University to give them notice to show cause before

the Vice Chancellor why appropriate orders for preserving the status-quo or other appropriate orders in connection with the appeals of the respondents 5 and 6 should not be made. The college authorities were given liberty to submit both personal and written representations and on January 7, 1978 the Secretary of the Governing Body of the College on behalf of the Governing Body addressed a letter to the Inspector of Colleges. The Secretary disputed the power of granting stay by the Vice Chancellor and also the authority of the University or the Vice-Chancellor to entertain the appeals of the respondent Nos. 5 and 6. The Secretary also made written submissions on the merits of the two appeals and against the granting of interim orders in favour of the two appellants. On January 9, 1978 the Vice Chancellor, Calcutta University heard the appellants and a representative of the Governing Body of the College. The Vice Chancellor ordered that the Birla College of Science and Education shall maintain the *status-quo ante* that is to say to maintain the position as it was prior to 30.9.1977 with regard to the services of Dr. B. P. Singh and Dr. Roy Choudhury till the final disposal of the appeal. The Vice Chancellor by the same order also directed the appellants to produce certain additional materials. He also directed the College authorities to submit the original records relating to the disciplinary proceedings against the two dismissed teachers. The vice Chancellor of the University of Calcutta had fixed the hearing of the two appeals on January 30, 1978.

6. Thereupon, the present appellants filed an application under Article 226 of the Constitution of India *inter alia* praying that the order of the Vice Chancellor dated January 9, 1978 be quashed and the respondents be commended not to give any effect or further effect to the said order dated January 9, 1978. On 18th January, 1978 Amiya Kumar Mookerji J. was pleased to issue Civil Rule No. 2411 (W) of 1978 and to grant interim orders. Subsequently, the interim orders were modified and, the Vice Chancellor was given liberty to dispose of the two appeals of the respondent Nos. 5 and 6 subject to the decision in the said Civil Rule. The Vice Chancellor by his order dated February 14, 1978 allowed the said two appeals, set aside the dismissal orders and made an order for re-instatement of the respondent Nos. 5 and 6.

7. On May 3, 1978 Amiya Kumar Mookerji J. disposed of the said Rule. The learned Judge quashed the orders of dismissal passed against the respondent Nos. 5 and 6 and all proceedings including the orders of the Vice Chancellor passed upon the appeals preferred by the respondent Nos. 5 and 6. The learned Judge *inter alia* held that unless the appellate Tribunal under Section 14 of the West Bengal College Teachers' (Security of Service) Act, 1975 was set up by the State Government, the provisions of the said Act would not be given effect to inasmuch as the provisions of the Act constituted a single scheme. His Lordship

further made it clear that his said order shall not prevent the members of the Governing Body of the College from taking any steps whatsoever against the teachers (meaning respondent Nos. 5 and 6) under any other law for the time being in force if they were so advised.

8. On May 10, 1978 the Honorary Secretary of the Governing Body of the College addressed two letters to the respondent Nos. 5 and 6. The text of both the said letters was as follows :

The Governing Body of the College dismissed you from your services on September 30, 1977 on the ground of misconduct. The Hon'ble High Court has since held that the entire provisions of the West Bengal College Teachers' (Security of Service) Act, 1975 relating to termination of your employment, appeal therefrom etc. constituted a single scheme and could not be given effect to unless the Appellate Tribunal was set up by the State Government and in that view of the matter including the dismissal passed under the said Act including the proceedings taken against you and the order of Vice Chancellor passed on appeal were all quashed. The Hon'ble High Court made it clear that the said order would not prevent the college from taking any step against you in any other law for the time being in force.

The Governing Body has since decided in view of the decision of the Hon'ble High Court and without prejudice to any of the rights and contentions of the college including that your services were validly and lawfully terminated on September 30, 1977 and with a view to avoid all disputes and controversies in future that your services be and are hereby terminated with immediate effect. The contract of employment dated 30th June, 1969 provides for a month's notice and it has been decided by the Governing Body that you be paid one month's salary in lieu of such notice.

Accordingly please note that your services stand terminated with immediate effect and you shall be paid one month's salary in lieu of the notice. You may collect all dues from the office of the College on any working day during office hours.

9. The respondents 5 and 6 again preferred appeals under Section 12 of the West Bengal College Teachers' (Security and Service) Act, 1975 against the said dismissal orders dated May 10, 1978. On May 13, 1978 the Inspector of Colleges, Calcutta University gave notice to the Governing Body of the College that on May 16, 1978 the Vice Chancellor as the authority duly empowered would hear the matter. The Governing Body was asked to show cause why ad-interim orders shall not be made. On 16th May, 1978 the Honorary Secretary of the Governing Body of the College had addressed a letter to the Inspector of Colleges, Calcutta University requesting that the matter might not be proceeded with without furnishing the copies of the petitioners' appeal and without affording opportunity of hearing to the College Authorities.

10. On 17th May, 1978 the Vice Chancellor of the 'Calcutta University granted stay of the operation of the orders of the termination of service of the respondents 5 and 6 till the disposal of the appeals preferred by them.

11. On 12th May, 1978 the appellants presented this appeal under Clause 15 of the Letters Patent against the judgment of Amiya Kumar Mookerji J. dated May 3, 1978, in so far as the same purported to quash the orders of dismissal passed by the Governing Body of the College on September, 1977 against the respondents 5 and 6 and the proceedings taken by the Governing Body of the College against the said respondents. The University of Calcutta, the Vice Chancellor, the Registrar and the Inspector of Colleges of the Calcutta University, who are respondents 1 to 4 have filed a Memorandum of Cross Objection against the said judgment of Amiya Kumar Mookerji J. dated 3rd May, 1978. The respondents 5 and 6 have also filed another Memorandum of Cross-Objection. Both sets of the cross objector-respondents have contended that the learned Single Judge had erred in quashing the orders of the Vice Chancellor passed on appeals preferred by the respondents 5 and 6 under Section 12 of the West Bengal College Teachers' (Security of Service) Act, 1975 against their dismissal from service by the Governing Body of the College dated September 19, 1977. According to the respondents the Vice-Chancellor had power and authority to hear the said appeals of the respondents 5 and 6.

12. The respondents 1 to 4 have filed an application under Order 41 Rule 27 of the Code of Civil Procedure for taking into consideration certain alleged subsequent events after the judgment was delivered in Civil Rule No. 2441 (w) of 1978. The respondents 5 and 6 have also prayed that this Court ought to take notice of the said subsequent events mentioned below. According to these respondents, the appellants had approbated the judgment dated May 3, 1978 of Amiya Kumar Mookerji J. quashing the dismissal of the respondents 5 and 6 by acting in conformity with the said judgment. The College Authorities had accepted the said judgment and on May 10, 1978 had passed fresh orders for dismissal against the respondents 5 and 6. The respondents under section 12 of the above Act have again preferred appeals against the said subsequent orders of the College Authorities dismissing them from service. The respondents 1 to 4 have further stated that the State Government by an order published in the Official Gazette had constituted the Appellate Tribunal under the West Bengal College Teachers' (Security of Service) Act, 1975 with effect from 6th May, 1978.

13. The learned advocate for the respondents have submitted that the appellants having accepted the judgment order of Amiya Kumar Mookerji J. so far as the same quashed their orders dated 30.9.77 dismissing the respondents 5 and 6 and they were estopped from further prosecuting

the present appeal presented by them against the said judgment of Amiya Kumar Mookerji J. dated 3rd May, 1978. We have heard the learned advocates for the parties on the said preliminary point and we find no substance in the same. In the facts of this case it cannot be held that the appellants' statutory right under Clause 15 of the Letters Patent to prefer an appeal against the aforesaid judgment of Amiya Kumar Mookerji J. had come to an end. In the first place, the letters of the Honorary Secretary of the said College dated 10th May, 1978 which we have set out in the earlier portion of our judgment clearly stated that the Governing Body's decision to terminate the services of the respondents 5 and 6 was without prejudice to any of their rights and contentions including that the services of the respondents 5 and 6 were validly and lawfully terminated on September 30, 1977. In considering whether the appellants had approbated the said judgment and whether the appellants are now estopped, we have to determine whether or not they have accepted any benefit under the said judgment and had thereby deemed to have renounced all their rights inconsistent with it (vide (1) *C. Beepathuma and Others v. Velasari Shankaranarayana Kadambolihaya and Others*, AIR 1965 SC 241). Further, the majority decision in (2) *Bhau Ram v. Baij Nath Singh*, AIR 1961 SC 1327, was that in the absence of some statutory provision or of well-recognised principle of equity, no one can be deprived of his legal rights including his statutory right of appeal. The majority decision in the said case was that a statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree. In this case, after reserving their rights and contentions about the previous dismissal orders dated September 3, 1977 the appellants had purported to abide by the order of the learned Single Judge. But in no sense they had taken any benefit under the said order de hors their claim on merits. Further, in this case there was no question of making a choice between two inconsistent rights. Therefore, the conditions necessary for the applicability of the doctrine of approbate and reprobate were not present. We, accordingly, uphold the submission of Mr. Bajoria, learned advocate for the appellants, that the principles of law laid down in *Bhau Ram v. Baij Nath Singh* (supra), fully support the right of the appellants to proceed with this appeal. There is another serious impediment in the way of the respondents pleading that this appeal is not maintainable. The respondents have themselves preferred Cross-Objections against the judgment of Amiya Kumar Mookerji J. dated 3rd May, 1978 so far as the same quashed the orders of the Vice Chancellor under Section 12 of the West Bengal College Teachers' (Security of Service) Act, 1975. But, at the same time the respondents 5 and 6 under Section 12 of the said Act have preferred appeals to the University against their dismissal from

service by letters dated 10th May, 1978 issued by the Honorary Secretary of this College. The University has entertained the said appeals. Therefore, the appellants may also urge that the respondents have accepted the aforesaid judgment of Amiya Kumar Mookerji J. and have acted upon the same and, therefore, they are estopped from preferring Cross Objection. It is clear that the action taken by both the appellants and the respondents were without prejudice to their respective rights to prefer appeal/cross-objections against the aforesaid judgment of Amiya Kumar Mookerji J. Therefore, we over-rule the preliminary objection raised by the respondents.

14. We now take up the consideration of the merits of the appeal preferred by the members/office bearers of the Governing Body of the College against the order of the learned Single Judge quashing the orders of dismissal dated 30th September, 1977. The appellants as petitioners had filed the writ petition *inter-alia* challenging the jurisdiction of the university to entertain the two appeals preferred by the respondents 5 and 6 under Section 12 of the West Bengal College Teachers' (Security of Service) Act 1975. The appellants had also challenged the delegation made by the Syndicate of the Calcutta University in favour of the Vice Chancellor of University for hearing these two appeals. The respondents 5 and 6 themselves did not file any writ petition praying for quashing the order of the Governing Body dismissing them with effect from 30th September, 1977. It is also debatable whether a writ would be available against the Governing Body of the above-named college. This Court while disposing of the said writ petition of the present appellants, could not validly quash orders made by the appellants themselves. As already stated, the learned Single Judge was required to determine whether or not the two appeals under Section 12 of the Act preferred by the two appeals of the respondents 5 and 6 were maintainable and whether the orders passed by the Vice Chancellor in respect of them were lawful and within his jurisdiction. In case the court found that the appeals of the respondents 5 and 6 were maintainable and the orders passed thereon were valid, the Civil Rule obtained by the appellants was liable to be discharged. If, on the other hand, it was found that the said appeals of the respondents 5 and 6 did not lie or that the Vice Chancellor had no jurisdiction to entertain and hear the said appeals, appropriate orders might have been made by this Court for quashing the appellate proceedings. But, in either view of the matter, the Court entertaining a writ petition filed by the College Authorities could not have quashed the orders passed by the College Authorities themselves. Mr. Bajoria, learned advocate for the appellants has further pointed out that the right of the Governing Body of a college to pass disciplinary orders against the teachers of the college were not for the first time, created by the West Bengal College Teachers' (Security of Service) Act, 1975. The said Act purported to regulate and modify.

the powers of the Governing Body over the teachers of the college by *inter alia*, making certain provisions for security of service of the college teachers. The Act has *inter alia*, laid down the procedure for imposing penalties the Act also has provided for appeals to the University by the teachers against orders imposing penalties under Section 9(1) of the Act; the Act also contains provisions for constitution of an Appellate Tribunal. In case the appellants are right in their submission that until the Appellate Tribunal under Section 14 of the Act was constituted the provisions of the Act relating to imposition of penalties under Section 9 and for preferring appeals therefrom under Section 12 did not come into force, then the college teachers would be continued to be governed by the terms and conditions of their services which existed prior to the commencement of the Act.

15. The next submission of Mr. Bajoria is that at the date of the presentation of the appeals by the respondents 5 and 6 to the University against the resolution of the Governing Body of the College dated 30th September, 1977 neither the University nor its delegate was competent to exercise the appellate powers under Section 12 of the West Bengal College Teachers (Security of Service) Act, 1975. According to Mr. Bajoria until and unless the appellate tribunal had been constituted under Section 14 of the said Act and the provisions of Section 12 were still inoperative. Section 14 did not leave any discretion with the State Government and the State Government was bound to constitute an appellate tribunal and, therefore, until and unless such an appellate tribunal is constituted, there could be no question of the University entertaining appeals against order of the College Authorities imposing penalties upon the college teachers. Mr. Bajoria submitted that Section 12 and 14 are so inseparably connected with each other that until and unless the higher tribunal under Section 14 is constituted, the right of appeal under Section 12 of the Act would remain ineffective and unavailable against the orders under Section 9 of the Act. The learned Single Judge while making the Civil Rule absolute has upheld this submission of the appellants.

16. Having given our anxious consideration to the matter, we are unable to agree with the above proposition. The West Bengal College Teachers' (Security of Service) Act, 1975 was enacted to provide for the security of service of teachers of affiliated constituent and government sponsored colleges in West Bengal. Sub-section (3) of Section 1 of the said Act laid down that the Act shall come into force on such date as the State Government may by notification in the Official Gazette appoint. On 9th October, 1975 the Notification No. 1051 CC was published in pursuance of sub-section (3) of Section 1 of the said Act, appointing 9th day of October, 1975 as the date on which the said Act shall come into force. Therefore, 9th October, 1975 was the date of the commencement of the provisions of the West Bengal College Teachers' (Security of Service) Act,

1975 and all the provisions of the said Act including Section 12 had come into force. The Governing Body of the college itself purported to follow the provisions of the said Act in the matter of imposing penalties upon the respondents 5 and 6. The Honorary Secretary of the College on behalf of the Governing Body by a letter dated 30th September, 1977 forwarded to the Vice Chancellor, University of Calcutta two copies of the orders of the Governing Body imposing penalties upon the respondents 5 and 6 in accordance with sub-section (1) of Section 9 of the West Bengal Act XXXIV of 1975. The Secretary further intimated that the said communication was being made in accordance with Section 10 of the said Act.

17. Section 10 *inter-alia* requires that the order of the Governing Body shall be communicated to the teacher concerned and the same shall also be reported to the University to which such college is affiliated. Section 12 of the Act confers a substantive right upon a teacher who is aggrieved by an order imposing any of the penalties referred in sub-section (1) of Section 9, to prefer an appeal within 30 days from the date of such order to the University to which the college is affiliated. An order of penalty under Section 8 by the Governing Body of the college upon any teacher of the college is subject to an appeal under Section 12 of the Act. The said section 12 does not qualify that such right to prefer appeal against any order imposing penalties shall not be exercised until the Tribunal under Section 14 is set up. In other words, the right of appeal under Section 12 has not been made conditional upon constitution of the appellate Tribunal under Section 14 of the said Act. The object of the Act no doubt is to set up a hierarchy of quasi-judicial authorities/tribunals. In the lowest tier is the domestic enquiry by the Governing Body. The University has been constituted the appellate authority from the orders of the Governing Body imposing any of the penalties in sub-section (1) of Section 9. The Appellate Tribunal constituted under Section 14 by the State Government is the apex. The Governing Body of a College or a teacher may prefer an appeal against an order passed under Section 12 of the said appellate tribunal within the prescribed time.

18. In this case, simultaneously with the commencement of the West Bengal College Teachers' (Security of Service) Act, 1975 the State Government did not constitute the Appellate Tribunal under Section 14. On 6th May, 1978 the State Government under Section 14 of the Act had constituted the appellate tribunal. But we are not prepared to hold that because of the delay on the part of the State Government in constituting the appellate tribunal under Section 14, a teacher against whom penalty under sub-section (1) of Section 9 of the said Act has been in the meantime imposed, shall be deprived of his right to prefer an appeal to the University under Section 12. As soon as the Act including Section 12 thereof came into force, the University became competent to exercise

appellate powers under Section 12, because the Act did not contemplate any notification or order for vesting of such appellate powers upon the University. In case, we accept the submission of the learned advocate for the appellants, that the right of appeal under Section 12 would remain suspended until and unless the Appellate Tribunal under Section 14 of the Act is constituted, it would mean that inspite of the State Government's notification under Section 1(3) of the Act, Section 12 was not brought into force. In other words, the court would be required to hold that even though by a notification the entire Act had come into force, the commencement of Section 12 was postponed till the State Government had constituted the appellate tribunal under Section 14(1) of the Act. We are not prepared to read into the Act something which is not there or to defer the date of the commencement of the Act contrary to the clear intentions of the Act itself. As soon as the Act came into force, the power of the Governing Body of a college which was governed by the said Act to impose upon a teacher of the college any of the penalties specified in Section 9(1) would be regulated by the provisions of the said Act. In other words, the said powers of the Governing Body must be exercised in compliance with the provisions of the said Act. In this case, the Governing Body of the college concerned also purported to act and proceed under the Act in the matter of imposing penalties upon the respondents 5 and 6. When such penalty orders imposed by the Governing Body were communicated to the teachers concerned, they had right to present appeals to the University. There is no indication in the Act that such right of a teacher to prefer appeal under Section 12 would remain in abeyance or would be deferred till the higher tribunal under Section 14 of the Act is constituted by the State Government. Because of a possible time lag between the commencement of the Act and the constitution of the Appellate Tribunal under Section 14, a teacher upon whom a penalty is imposed under Section 9 of the Act cannot be deprived of his right to present an appeal to the University. As already stated, as soon as the Act was brought into force the University became competent to entertain appeals under Section 12 and the exercise of the said appellate powers of the University cannot be denied because the tribunal which may entertain appeals from the orders of the University made under Section 12 may not have been constituted.

19. In this proceeding arising under Article 226 of the Constitution, it is not relevant to consider whether the civil court would be competent to entertain a suit in respect of orders made under Section 9 or under Section 12 when no appellate tribunal under Section 14 had been constituted. Section 16 of the Act had provided that the decision of the appellate tribunal shall be final and no suit or proceeding shall lie in any civil court in respect of the matters required to be referred to the said tribunal. Section 16 of the Act, in the first place, expressly has ousted civil court's

jurisdiction *inter-alia*, in respect of matters required to be referred to the said tribunal under Section 14. The Act, however, does not contain any express provision for making the decision of the University made under Section 12 of the Act final and also for ousting the civil court's jurisdiction. In this appeal arising out of a writ proceeding we are not called upon to decide to what extent the civil court's jurisdiction has been ousted in respect of orders and decisions made by different authorities under the Act. Because there could be no question of the said Act excluding this court's jurisdiction under Article 226 of the Constitution in respect of such orders and decisions made under the said Act.

20. The Full Bench decision in (3) *Mahendra Nath Roy v. Delraddi Chakdar and another*, AIR 1966 Cal. 285, has no relevance in the present context. The Full Bench in *Mahendra Nath Roy's* case (supra) *inter-alia* held that the jurisdiction of a civil court to entertain a suit between a *bargadar* and the owner whose land the *bagadar* cultivates, with regard to any of the matters specified in sub-section (1) of Section 7 of the West Bengal Bargadar's Act, 1950 was not barred by sub-section (2) of Section 9 of the said Act where no Board has been established under the said Act for the local area within which the land in question is situated. The Full Bench *inter alia* held that section 6(1) of the Bargadars Act, 1950 was not mandatory but discretionary and it was optional for the State Government to establish a Bhag Chas Conciliation Board in any particular local area. According to the Full Bench, the jurisdiction of the civil court was not excluded under Section 9 (2) of the Bargadars Act, 1950 when a Board had not been established in any particular area. When the State Government failed to establish a Board, the civil court could not be deprived of all its powers or the right of a person affected to take recourse to a remedy by way of suit cannot be barred. Mr. Bajoria, learned advocate for the appellant, submitted, with reference to the observations of the Full Bench decision *Mahendra Nath Roy v. Delraddi Chakdar and another*, (supra), at page 289 of the reports that Section 14 of the West Bengal College Teachers' (Security of Service) Act, 1975 was mandatory and not directory and, therefore, the State Government had a duty to constitute the appellate tribunal under Section 14. In our view, the question whether Section 14 was mandatory or not may be a relevant consideration for determining whether the civil court's jurisdiction has been excluded from the date of the commencement of the Act or from the date on which the appellate tribunal was actually constituted. But the said question whether the state government has a duty or an option under Section 14 is not at all germane in the matter of presentation of appeals under Section 12 of the Act. As already stated when a penalty is imposed under Section 9, a right accrues in favour of the aggrieved teacher to prefer an appeal to the University in terms of Section 12. The

University's appellate power under Section 12 has not been either expressly or impliedly made dependant or conditional upon constitution of an appellate tribunal which would entertain appeals from the order under Section 12.

21. For the aforesaid reasons, we reach the conclusion that from the date of the commencement of the West Bengal College Teachers' (Security of Service) Act, 1975 the University became competent to entertain appeals against orders passed under Section 9(1) of the Act by the Governing Bodies of the colleges which came within the ambit of the said Act. Thus, with effect from the date of the commencement of the Act, a teacher of such a college acquired a vested right to present an appeal to the University against the orders of the Governing Bodies imposing any of the penalties specified in Section 9(1) of the Act.

22. The next submission of Mr. Bajoria is that even assuming that the right of appeal under Section 12(1) was available even before the constitution of the appellate tribunal under Section 14, in the instant case, the Vice Chancellor, Calcutta University had no jurisdiction, in the absence of a valid delegation of powers under Section 12 to entertain the appeals of the respondents 5 and 6.

23. The University is the appellate authority under Section 12 of the West Bengal College Teachers' (Security of Service) Act, 1975. Section 13 of the said Act empowers the University to delegate the powers conferred upon it by Section 12 to such authority or officer not below the rank of a Deputy Inspector of Colleges as the University may specify. The expression 'University' has not been defined in the West Bengal College Teachers' (Security of Service) Act, 1975. Therefore, Mr. Bajoria learned advocate for the appellants, correctly submitted, that, with reference to orders passed under Section 9 by the Governing Bodies of the colleges affiliated to the Calcutta University, the meaning of the expression "University" appearing in Section 12 of the Act should be ascertained by looking into the provisions of the Calcutta University Act, 1966. Section 1(2) of the Calcutta University Act, 1966 is as follows ;—

"The University means the University of Calcutta as constituted under this Act."

The Chapter II of the said Act deals with the University and its powers. Section 3(1) of the said Act lays down "the first Chancellor and the first Vice-Chancellor of the University and the first members of the Senate, the Syndicate and the Academic Council, and all persons who may hereafter become such officers or members, so long as they continue to hold such office or membership, shall constitute a body corporate by the name of the University of Calcutta." In other words, the University of Calcutta consists of :—

- (a) the Chancellor, (b) the Vice-Chancellor, (c) the Senate and
- (d) the Academic Council.

Each one of these persons/bodies are constituents of the University of Calcutta which is a body corporate having perpetual succession. Section 4 of the said Act enumerates the powers of the University. The Vice Chancellor under Section 6 of the Act is one of the officers of the University and his power and duties have been enumerated in Section 9 of the said Act. But he has been vested with some and not all the powers of the University of Calcutta. Apart from his powers of general control and supervision as specified in sub-section (4) of Section 9 of the Act, the Vice-Chancellor can exercise such other powers and discharge such other duties as may be delegated to him by any other authority or body of the University or as may be prescribed by statutes, ordinances and regulations. It is however not necessary to set out in detail the powers the different authorities of the University including the Syndicate as provided in Chapter V of the Calcutta University Act, 1966. It would be sufficient to point out that Section 23 of the Calcutta University Act, 1966 has not specifically provided that the Syndicate shall have powers to hear appeal which may lie to the University under any law.

24. The respondents in this appeal submitted that Section 23(2) of the Calcutta University Act, 1966 has conferred upon the Syndicate all powers of the University not otherwise provided for in the Act. In other words, Section 23(2) has vested the Syndicate with the residuary powers of the University and therefore, accordingly the Syndicate could exercise the said appellate powers of the University under Section 12 of the West Bengal College Teachers' (Security of Service) Act, 1975. In the instant case, the Syndicate had validly delegated the said appellate powers under Section 12 read with Section 13 of the West Bengal College Teachers' (Security of Service) Act, 1975.

25. It is, therefore, necessary to examine the scope and effect of Section 23(2) of the Calcutta University Act, 1966. The said sub-section consists of two parts: (a) all powers of the University not otherwise specifically provided have been vested upon the Syndicate and (b) the Syndicate shall have necessary powers to give effect to the provisions of the Calcutta University Act. Undoubtedly, the first part confers residuary powers of the University upon the Syndicate. The second part of Section 23(2) authorises the University to exercise incidental and consequential powers to give effect to the provisions of the Calcutta University Act. Mr. Bajoria, learned advocate for the appellants, submitted before us that the Syndicate's residuary powers under Section 23(2) are confined to such powers of the University, which have been mentioned under Section 4 of the Calcutta University Act, 1966 but have not allocated to any of its constituent authorities. In other words, the submission of Mr. Bajoria is that Section 4 enumerates the totality of powers of the University. The

subsequent Sections of the Calcutta University Act have purported to allocate and distribute most of these powers among the officers and the authorities constituting the Calcutta University. According to Mr. Bajoria, the Syndicate under Section 23(2) may exercise only those powers of the University which have not been specifically distributed among these officers and authorities. But in no event the Syndicate in the name of the University can exercise any power which is not mentioned in any of the clauses of Section 4 of the Act. Although the above submission appears to be attractive at the first sight, upon further consideration we are unable to accept the same. No doubt, the Calcutta University being a body corporate, its powers, duties and functions are primarily derived from the Calcutta University Act, 1966 and the statutes and regulations framed thereunder. But by subsequent legislation additional powers could be conferred upon the Calcutta University. The West Bengal College Teachers' (Security of Service) Act, 1975 vested the Universities in West Bengal including the Calcutta University with powers to entertain appeals by the teachers against whom penalties under Section 9(1) of the Act might be imposed. In other words, the West Bengal College Teachers' (Security of Service) Act, 1975 has given additional powers to the University. It is true that under the Calcutta University Act the Syndicate is one of the several authorities constituting the University and the Syndicate does not enjoy all the powers of the University. But, under the Calcutta University Act apart from the powers allocated to it under sub-section (1) of Section 23 of the Calcutta University Act, the Syndicate may also exercise the residuary powers of the University. When the Calcutta University Act, 1966 was enacted, the appellate powers of the University under Section 12 of the West Bengal College Teachers' (Security of Service) Act, 1975 was not even in contemplation. Subsequently, the Universities including the Calcutta University were constituted as the appellate authorities under Section 12 of the said Act. Mr. Bajoria did not urge before us that the Calcutta University itself cannot exercise such appellate powers under Section 12 of the said Act in the absence of same being specified in Section 4 of the Calcutta University Act by amendment of the Calcutta University Act. In fact, we find no legal impediment in the way of conferment of such appellate powers under the University by a subsequent statute, namely, the West Bengal College Teachers' (Security of Service) Act, 1975. The University of Calcutta is composed of (1) Chancellor, (2) Vice Chancellor, (3) Senate, (4) Syndicate and (5) Academic Council. It is not practicable for the Calcutta University itself to discharge such appellate powers and it must exercise its appellate powers through one of these authorities. In the absence of any specific provision either in the Calcutta University Act or in the West Bengal College Teachers' (Security of Service) Act 1975, allocating or distributing such appellate powers

under Section 12 of the 1975 Act, the Syndicate which has been vested with the residuary powers of the University could validly exercise on behalf of the University the said appellate powers to entertain appeals of teachers against orders imposing penalties by the Governing Bodies of colleges affiliated to the Calcutta University. The Section 13 of the West Bengal College Teachers' (Security of Service) Act, 1975 recognized that the appellate powers under Section 12 of the Act may be delegated.

26. We are not prepared to accept the submission of Mr. Bajoria that Section 23(2) has empowered the Syndicate to exercise only those powers of the University which have been conferred upon the University under Section 3 of the Calcutta University Act but not allocated or distributed to any of the authorities under the Act. It is significant to note that words "specifically provided for" have not been qualified by the expression "in the Calcutta University Act". Therefore, once it is held that the University of Calcutta has been entrusted with additional powers under the West Bengal College Teachers' (Security of Service) Act 1975 without specifying the officer or the authority who may exercise such additional powers, the Syndicate would be legally entitled to exercise the said additional powers of the University.

27. In the result, we reach the conclusion that the expression "all powers of the University not otherwise specifically provided for" in Section 23(2) of the Calcutta University Act would include not only the residuary powers of the University under the Calcutta University Act itself but also the powers of the University conferred by any other law and which have not been specifically distributed or delegated by the said law to any officer or authority of University. Neither, the Calcutta University Act nor the West Bengal College Teachers' (Security of Service) Act 1975 does specify that which authorities composing the University would exercise the appellate powers of the University under Section 12 of the Act of 1975. Therefore, the Syndicate can exercise the said powers by either itself acting as the appellate authority or by delegating the same in terms of Section 13 of the West Bengal College Teachers' (Security of Service) Act, 1975. Accordingly, the Syndicate of the Calcutta University had validly empowered the Vice Chancellor to hear and dispose of the appeals preferred by the respondents 5 and 6 against their removal.

28. Therefore, the judgment of the learned single Judge cannot be sustained. The two appeals of the respondents 5 and 6 under Section 12 were maintainable in law and the Vice Chancellor was entitled to act as the appellate authority under Section 12 read with Section 13 of the West Bengal College Teachers' (Security of Service) Act, 1975. We also set aside the order of the learned Single Judge that the orders of dismissal passed by the Governing Body of the College were not

valid. We, however, express no opinion upon the merits of the order of the Vice Chancellor disposing of the two appeals under Section 12 of the Act. We have not also decided whether or not the dismissals of the respondent Nos. 5 and 6 were lawful. All the parties would be entitled to proceed further in accordance with law in respect of the said appellate decision of the Vice-Chancellor under Section 12 of the Act.

29. Subject to these observations, we allow this appeal, set aside the judgment appealed against and we discharge the Civil Rule No. 2411(w) of 1978. The cross-objections are also allowed to the above extent.

30. There will be no order as to costs.

31. On the prayer of Mr. Bajoria, there will be stay of the operation of this order till one week after the re opening of the Court after the long Vacation. But, we make it clear that at this stage, we are not deciding which body is the lawfully constituted Governing Body of the College. Therefore, we need not consider the subsequent event of conversion of the College into a Sponsored Institution and the appointment of an *Ad-hoc* Committee.

32. Let the appeal be put up "For Orders" one week after the re-opening of the Court after the long Puja Vacation regarding disbursements of the moneys deposited in terms of the interim order.

Roy, J. : I agree.

K. M. G.

[CIVIL APPELLATE JURISDICTION]

*Before Mr. Justice Murari Mohan Dutt and Mr. Justice
Dhires Chandra Chakravorti*

Decision : September 4, 1978

Anath Bandhu De

Versus

Appellant

Krishna Lal Das & Ors.

Respondents*

Hindu law—Devolution of Shebaitship.

Nandi installed the Deity of Gopinath Jew. His son Mathura executed an Arpannama whereby he dedicated immovable properties in favour of the Deity, appointed his wife and his brother's wife as joint shebait with right of survivorship and directed that the shebait would appoint or nominate his successor. On the death of the brother's wife Mathura's wife became the sole shebait, she appointed Sristidhar as the next shebait. Instead of appointing his successor, Sristidhar by his will laid down a line of succession in tail male to shebaitship and directed that of his 4 sons the eldest Harinarayan would be the first shebait and

*S. A. no. 674 of 1970.

thereafter his three other sons would become shebait in succession and after the death of his sons, the eldest among the grandsons, great grandsons and lineal male descendants would be shebait. After the death of Sristidhar dispute arose among his sons regarding shebaitship and two of his sons filed a suit against others. That suit was compromised and the parties agreed to be bound by the terms mentioned in Sristidhar's will. The youngest son of Sristidhar before his death appointed his son (defendant No. 1) as the shebait. Plaintiff filed a suit for declaration that he was the lawful shebait and that appointment of defendant no. 1 was illegal. Trial court dismissed the suit and the appeal was also dismissed by the lower appellate court. Plaintiff then filed the second appeal to High Court and contended that he being the only son and heir of the last legal shebait, succeeded to the shebaitship of the Deity.

HELD : *The line of succession to the office of shebait in tail male as laid down in the will of Sristidhar is opposed to Hindu law and is void and inoperative. The compromise decree whereby the parties bound themselves by the terms of the will of Sristidhar regarding appointment of shebait could not render valid the line of succession laid down by Sristidhar in his will as the same was void being opposed to Hindu law. Appointment of Harinarayan, father of the plaintiff was legal and valid as he was the immediate successor in office of Sristidhar. Appointment of other sons was not in accordance with the terms of the will of the founder. According to Hindu law, when the worship of a Deity has been founded, the shebaitship is held to be vested in the heirs of the founder unless he has disposed of it otherwise. In the instant case a mode of devolution has been laid down by the founder. Since Harinarayan did not appoint his successor in terms of the will of the founder there was a break in the mode of devolution and it would revert back to his heirs. Plaintiff is not entitled to the same by right of inheritance. Defendant no. 1 has not acquired any title to shebaitship by adverse possession. The appeal is dismissed.*

Cases referred to :—

- (1) *Mogohar Mukherjee v. Bhupendra Nath Mukherjee*, 37 CWN 29 FB
- (2) *Ganesh Chandra Dhur v. Lal Behari Dhur*, 41 CWN 1
- (3) *Gossamee Sree Greedhareeji v. Ramanlolljee Gossamree*, LR 16 IA 137
- (4) *Pamajha Nath Mullick v. Pradhyuma Kumar Mullick*, AIR 1925 PC 139
- (5) *Jagannath Prasad Gupta v. Ranjit Singh*, ILR 25 Cal 354

Mukul Gopal Mukherjee ... for Appellant
Monmohan Mukherjee and Miss. Suniti Sen Gupta ... for Respondents

The judgment of the Court was as follows :—

Dutt, J. : This appeal is at the instance of the plaintiff and it arises out of a suit for declaration of title, permanent injunction and for account's.

2. The case of the plaintiff was that one Nayan Chand Nandi installed the deity Sree Sree Gopinath Jew Thakur at 5A, 5B and 5C, Ratan Babu Road, Cossipur, more than a century ago. His son Mathura Mohan dedicated the ka schedule properties to the deity. The Kha schedule properties were acquired out of the income of Ka schedule properties. By an Arpannama executed by Mathura Mohan in or about A.S. 1229 B.S., he appointed his widow Rashmoni and his brother's widow Jagadishwari as joint shebait of the deity. The Arpannama is not however, traceable. After the death of Jagadishwari, the shebaitship of the deity devolved upon Rashmoni who acted as the sole shebait up to about 1859. By a will dated October 21, 1859, Rashmoni appointed her relation Sristidhar as the shebait of the deity. Sristidhar, by a will which was probated, created a line of succession to the office of the shebait. He appointed his four sons, namely, Harinarayan, Haripada, Haribhusan and Harimohan as the successive shebait and it was directed that after their deaths the eldest for the time being amongst his grandsons, great grandsons and lineal male descendants would be the shebait of the deity. As per the direction in the will of Sristidhar, Harinarayan, the father of the plaintiff, became the shebait.

3. It appears that there was some dispute amongst the sons of Sristidhar about the shebaitship of the deity. Haribhusan and Harimohan, the father of the defendant no. 1, instituted a suit being Title Suit No. 89 of 1918 which was re-numbered as Title Suit No. 1 of 1927, in the Court of the Second Additional Sub-ordinate Judge, Alipore, against Harinarayan and Sm. Manjusree Dasi, the widow of Haripada, relating to the shebaitship of the deity. That suit was eventually compromised between the parties and a compromise decree was passed on March 2, 1928. It was *inter alia* directed in the said compromise decree that the parties would be bound by the terms and conditions as mentioned in the will dated Magh 29, 1310 B.S. of the late Sristidhar Dey including the direction for appointment of successive shebait. Further, it was directed that in accordance with the terms of the said will, the defendant no. 1 Harinarayan would continue as the shebait and on his death or relinquishment of the office of shebait, the plaintiff no. 1 Haribhusan Dey and in his absence, the plaintiff no. 2 Harimohan Dey would successively become the shebait, Harinarayan remained the shebait till September 14, 1928 when he died and thereafter Haribhusan became the shebait. Haribhusan died on April 18, 1948 and thereafter Harimohan became the shebait. Harimohan died on March 3, 1960, but before his death he appointed his

son Krishnalal, the defendant no. 1 as the shebait on February 7, 1955. The contention of the plaintiff was that the appointment of the defendant no. 1 was illegal. It was the plaintiff's case that he was the original shebait of the deity and was entitled to have the custody of the deity and to possess the debuttar properties on behalf of the deity. Accordingly, the plaintiff filed the said suit for a declaration that he was the lawful shebait of the deity and for permanent injunction and accounts.

4. The proforma defendants nos. 1 to 8, who are the heirs of the other sons of Sristidhar, supported the plaintiff. Krishnalal who was the principal defendant contested the suit. His defence was that under the Arpannama of Mathura Mohan, the relevant provision of which were to be found in the will of Rashmoni, Sristidhar could not lay down any line of succession in his will. He was only entitled to appoint his next successor-shebait. In any event, Sristidhar having created a line of succession in tail male which was unknown to Hindu law, such line of succession was void and invalid. Harimohan, who was the last surviving son of Sristidhar, held office of the shebait from April 1918 to March 1960 and on the strength of the appointment made by him, the defendant was now lawfully holding the office of the shebait. It was contended that as the line of succession in tail male as laid down in the will of Sristidhar was invalid in law, the plaintiff did not become the shebait after the death of Harimohan, and he was not entitled to any of the reliefs prayed for in the suit.

5. The learned Subordinate Judge, 4th Court Alipore who tried the suit, upheld the contention of the defendant and dismissed the suit. The plaintiff, being aggrieved by the judgment and decree of the learned Subordinate Judge, filed an appeal against the same which was heard by the 9th Court of the Additional District Judge Alipore. The learned Additional District Judge took the same view as that of the learned subordinate judge. Further, he held that as Harinarayan did not appoint his successor, the appointments of his brothers in accordance with the will of Sristidhar or in terms of the compromise decree were void, and that accordingly, the shebaitship would revert to the family of the founder Mathura Mohan Nandi. Upon the said findings, he dismissed the appeal. Hence this second appeal by the plaintiff.

6. It has been already stated that the will of Mathura Mohan Deo is not traceable, but the directions given by him for the appointment of shebait have been mentioned in the will of his wife Rashmoni, who became the shebait. It appears from the will of Rashmoni that her husband, the founder of the debutter, directed that the shebait holding office for the time being would, before his death or relinquishment of his office of the shebait, appoint or nominate his successor. It also appears that before his death Mathura Mohan had appointed his wife Rashmoni and his brother's widow Jagadiswari as the joint shebait

with the right of survivorship, and that since the death of Jagadishwari, the office was held by Rashmoni alone. Under her will, Rashmoni appointed her near relation Sristidhar as the next shebait of the deity with the direction that before his death or relinquishment of office, he should appoint one of his heirs if he is considered suitable or any other person as he would think fit, as the shebait. Instead of appointing his successor, Sristidhar by his will laid down a line of succession in tail male to the office of the shebait. He directed that his eldest son Harinarayan would be the first shebait and thereafter his other sons would become the shebaits in succession and, after the deaths of or relinquishment of office by his sons, the eldest for the time being amongst the grandsons, great grandsons and lineal male descendants would be the shebaits of the deity. Sristidhar was not the founder of the debutter, nor was he a donor and, accordingly, he had no right to create a line of succession contrary to that laid down by the founder. Even assuming that he had such a right, still he was not entitled to create a line of succession to the office of the shebait which was opposed and repugnant to Hindu law. The leading case on the point is the Full Bench case of (1) *Monohar Mukherjee v. Bhupendra Nath Mukherjee*, 37 CWN 29 FB. It has been laid down in that case that the founder of Hindu debutter is competent to lay down rules to govern the succession to the office of shebait, subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law. There can be no doubt that the line of succession to the office of the shebait in tail male as laid down in the will of Sristidhar is opposed to Hindu law and accordingly, it is void and inoperative.

7. Mr. Mukul Gopal Mukherjee, learned Advocate appearing on behalf of the plaintiff appellant, however, submits that as the plaintiff who is the son of Harinarayan, was in being when Sristidhar died, he is entitled to the office of the shebait, for he is not hit by the rule against perpetuity. It is true that the said rule is not applicable to the plaintiff as he was alive at the time of death of Sristidhar, but the gift of shebaitship was not made to him by Sristidhar independently by name. A similar question came up for consideration before the Privy Council in (2) *Ganesh Chunder Dhur v. Lal Behary Dhur*, 41 CWN 1. In that case, the founder of the debutter directed in his will as follows :

"I appoint my sons Kartick Chunder Dhur and Ram Chunder Dhur to be the Shebaits of the said Thacoors and I direct that upon the death, retirement or refusal to act of any of them or any of the future Shebaits the then next eldest male lineal descendant of Kartick Chunder Dhur or Ram Chunder Dhur shall act as a Shebait in place of the deceased or retiring Shebait or Shebaits refusing to act as such-it being my intention that the eldest for the time being in the male line of my said sons Kartick Chunder Dhur and Ram Chunder Dhur shall always remain as joint Shebaits and in the event

of the death or refusal to act of any Shebait the then next male member of the branch to which the Shebait dying or refusing belonged shall act as a Shebait in his place and stead."

8. The testator's son Kartick died on May 24, 1927, leaving his son Netye, and the other son Ram died on October 17, 1928 leaving four sons of whom Lalbehary was the eldest. It was held by the Privy Council that after the respective deaths of Kartick and Ram, by the will an invalid attempt was made to lay down the line of succession not permissible under the Hindu law. It was further held that though Lal Behary and Netye were in life at the testators's death, yet there being no independent gift of the office for life in favour of persons, who were to take respectively on the death or retirement of Kartick and Ram, including Lal Behary and Netye, they were not entitled to come in as shebait. It was directed that on the deaths of Kartick and Ram respectively, the succession to the office of shebait and the income of the estate must be according to the ordinary Hindu law of succession. In view of the above Privy Council decision, the contention made on behalf of the appellant cannot be accepted.

9. It has been stated already, that under the will of the founder of the debutter the existing shebait was to appoint his immediate successor. It is true that Sristidhar directed the appointment of his four sons one after another and thereafter created the line of succession opposed to Hindu law, but the appointment of Harinarayan, the father of the plaintiff, was quite legal and valid. Harinarayan was the immediate successor in office of Sristidhar. The appointments of other sons after Harinarayan were not in accordance with the terms of the will of the founder, for Sristidhar was only entitled to appoint his immediate successor. The lower appellate court has also held and, in our opinion, rightly that the appointment of Harinarayan was quite valid, and that the other appointments were invalid.

10. In this connection, it may be stated that the compromise decree whereby the parties bound themselves by the terms of the will of Sristidhar regarding the appointment of Shebait could not render valid the line of Succession laid down by Sristidhar in his will as the same was void being opposed to Hindu Law. The plaintiff might be under the impression that Harimohan would honour the agreement which was arrived at by the parties in the said suit relating to the compromise decree, but Harimohan violated the terms of the compromise decree and appointed his son, the defendant no. 1, as the next Shebait.

11. The question, however, is whether the plaintiff succeeded to the shebaitship after the death of his father Harinarayan. It has been laid down by the Privy Council in (3) *Gossamee Sree Greedharreeji v. Rumanlolljee Gossamee*, LR 16 IA 137, that according to Hindu law when the worship of a thakoor has been founded, the shebaitship is held to be

vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there had been some usage, course of dealing, or some circumstances to show a different mode of devolution. This principle has also been reiterated by the Privy Council in (4) *Pramatha Nath Mullick v. Pradhyumna Kumar Mullick*, AIR 1925 PC 139. In the instant case, a mode of devolution has been laid down by the founder of the debutter. It has been already stated that Mathura Mohan, in his will, directed that a shebait should, before his death, appoint or nominate his successor to the office. The shebaitship of the deity devolved in accordance with the said direction. The last shebait was Harinarayan who was the immediate successor of his father Sristidhar, as nominated by him. Harinarayan, however, did not appoint his successor to the office of shebait. Thus there was a break in the mode of devolution as directed by the founder of the debutter. It is claimed that the plaintiff being the sole heir of Harinarayan succeeded to the shebaitship of the deity under the Hindu law of succession. It is no doubt true that shebaitship is property and it is heritable like any other property, subject to the condition that the founder of the debutter has not laid down any mode of devolution of the office of shebait. In case such a mode is laid down, the office of shebait would devolve according to that mode. In the absence of any disposition of shebaitship, it will devolve in accordance with the Hindu law of succession, and, in that case, the office of shebait will be a hereditary office. In (5) *Jagannath Prasad Gupta v. Runji Singh*, ILR 25 Cal. 354, a Division Bench of this Court consisting of Maclean CJ and Banerjee J. has laid down that where a shebait does not appoint his or her successor as provided in the will of the founder, and where there is no other provision for the appointment of shebait, the management of the endowment must revert to the heirs of the founder. The shebaitship of the deity in the hands of Harinarayan was not hereditary and so the question of succeeding to it by the plaintiff as the heir of Harinarayan does not at all arise. In the circumstances, the plaintiff is not entitled to the same by right of inheritance. As Harinarayan did not appoint his successor in terms of the will of the founder, there was a break in the mode of devolution as laid down by the founder and it would, accordingly revert back to his heirs. The lower appellate court, in our opinion, has taken the correct view in this regard. The plaintiff's claim to shebaitship cannot, therefore, be allowed.

12. Before we part with this appeal, it may be recorded that the Court's below are right in holding that the defendant no. 1 has not acquired any title to the shebaitship by adverse possession.

For the reasons aforesaid, this appeal is dismissed, but in view of the facts and circumstances of the case, we direct the parties to bear their own costs throughout.

Chakravorti, J. : I agree.

P. R.

[CONSTITUTIONAL WRIT JURISDICTION]

Before Mr. Justice Amiya Kumar Mukerji

Decision : September 26, 1978

Orient Paper Mills

Versus

Appellant

Union of India and Others

Respondents*

Commission of Enquiry Act 1952, Sec. 3—Whether Commission has jurisdiction—Constitution of India, Art. 226(1)(a),(b) (c)—Whether fundamental right is violated and injury sustained by petitioner—Delay in making the court, if fatal—Whether petitioner is estopped from challenging jurisdiction of commission—Constitution of India Art. 77(1) (2),(3)—Whether notification not being in the name of the President and not being authenticated, is void—Discretionary power of Government to appoint a commission—Formation of opinion to be on what materials—Whether commission has power to enquire into matters which are vague and are not definite matters of public importance.

Petitioner is a public limited company of the Birla Group of concerns. After receipt of allegations of irregularities, lapses and improprieties, the Central Government on February 18, 1970 issued a Notification under sec. 3 of the commission of Enquiry Act 1959, appointing a commission of Enquiry consisting of Sri A. K. Sarkar. On October 22, 1970, petitioner wrote the respondent a letter stating that matters set out in Schedule "B" and 'C' were vague and indefinite. After various correspondence up to 1974, the Additional Director wrote the petitioner a letter that item 4 of Schedule "C" was specific and advising petitioner to go to court for determination of validity of interpretation otherwise commission would serve petitioner with summons and process to get the required information. Thereafter on May 8, 1974 Petitioner filed the application under Art 226 of the constitution challenging the validity of the Notification dated 18.2.70, obtained a Rule and order of injunction staying the enquiry with respect to matters in Schedule "C". The main grounds of challenge were that several items of enquiry were vague, indefinite and not definite matters of public importance, some of the matters had already been enquired into by various departments of the government, measures and actions had already been taken and there could not be further enquiry into such matters by the commission. Respondent contended (1) that this court had no territorial jurisdiction, (2) that the petition did not fall within clauses (a), (b), or (c) of Art. 226(1), there had been no violation of petitioner's fundamental right and no injury had been sustained; (3) that there had been inordinate delay in moving the court and (4) that petitioner had submitted to the jurisdiction of the

*Nos. 2529-32(w) of 1974 with No 2719 (w) of 1974 with No. 5120A, (w) of 1974 and nos, 3712-14 (w) of 1974.

commission and was estopped from challenging the jurisdiction of the commission in the present application. Petitioner contended that the Notification dated 18.2.70 not having been expressed in the name of the President of India as required by sec. 77(1) of the constitution was void, that the order had not been authenticated under Art. 77(2), (2) that when a resolution moved in both Houses of Parliament for appointment of a commission regarding allegations mentioned in schedule "C" to the Notification, were defeated, Government had no discretionary power to appoint a commission under sec. 3 of the commission of Enquiry Act, (3) that matters referred to in schedule "C" to the Notification were not definite matters of public importance and no opinion was formed by Government about necessity of appointment of a commission, (4) that the formation of opinion had to be made on relevant materials and not on extraneous considerations and (5) that the respondent acted mala fide.

HELD: Calcutta High Court has jurisdiction to entertain the application under Art. 226 of the constitution as part of the cause of action arose within its jurisdiction.

Where the commission of Enquiry has no power to enquire into the allegations, there subjecting the petitioner to such a proceeding itself is a substantial injury. Petitioners' writ petition came under Art. 226 (1)(b) of the constitution.

Delay of four years is not fatal, on that ground the petition cannot be thrown out where the jurisdiction of the commission to enquire into the matters has been challenged. Question of delay does not arise where a writ of prohibition is asked for.

In the instant case the petitioner has challenged the jurisdiction of the commission. If the appointment of the commission is without jurisdiction, then petitioner's acquiescence is no bar to the relief asked for.

Art. 77(3) of the constitution enables the President to make Rules for the more convenient transaction of business of the Government of India and for the allocation of the said business. Requirements of Art. 77(1) and 77(2) are merely directory and not mandatory. Courts are entitled to presume that the official acts are done in a proper manner.

There is no bar to appoint a commission by the Government in exercising its discretionary power even when a resolution to appoint a commission is lost in Parliament.

Under sec. 3 of the Commission of Enquiry Act, Government can appoint a commission of Enquiry only for the purpose of making an enquiry into any definite matter of public importance. Government is not authorised by this section to appoint a commission for the purpose of holding any enquiry into any other matter.

The exercise of power or of opinion under sec. 3 of the Act is formation limited or restricted only to definite matters of public importance, Factual existence of those materials is absolutely necessary.

In the instant case, detailed particulars pertaining to the matters of enquiry were not specified in the notification.

The decision not to appoint a commission after investigation was taken by the Central Government and it did not change its view. By changing its opinion government cannot change an indefinite matter or matter of no importance into a definite matter of public importance where in fact such matters did not exist. In the instant case no new facts were disclosed showing acquisition of new materials for which the opinion was changed.

High executives and relatives referred to in the allegation are too vague and indefinite. The extent of vagueness or indefiniteness and arbitrariness is evident from the requisition made by the commission for particulars. The retention of foreign exchange by manipulation of invoice values is utterly vague. Nothing has been specified as to what manipulation was made in respect of which particular goods regarding allegation of manipulation of cost structure. The matters in respect of which legal proceedings had already been taken and disposed of do not satisfy the test of public importance. These matters are neither definite nor of any public importance. Those are absolutely vague and general in nature on the basis of which no bonafide opinion could be formed that those matters are definite matters of public importance and for that purpose a commission of enquiry is required. The conditions precedent for exercising powers under sec 3 of the Act have not been fulfilled with respect to the impugned items referred to in schedule "C" to the Notification in as much as the matters are neither "definite" nor of any public importance. The Rule is made absolute.

Cases referred to :—

- (1) *M. V. Pazwade v. Dr. S. M. Hassen*, AIR 1954 Nagpur 71
- (2) *Brajanandan Sinha v. Joti Narayan*, AIR 1956 SC 66
- (3) *Gulab Kanwar v. Enforcement Officer*, AIR 1977 Cal 383
- (4) *Rabindra Nath Bose v. Union of India*, AIR 1970 SC 470
- (5) *Sheo Nath Singh v. Appellate Assistant Commissioner of Income-tax* 82 ITR 147
- (6) *Ramkrishna Dalmia v. Justice Tendolkar* AIR 1958 SC 538
- (7) *Karnataka State v. Union of India*, AIR 1978 SC 68
- (8) *State of U. P. v. O. P. Gupta*, AIR 1970 SC 679
- (9) *State of Punjab v. S. S. Singh*, AIR 1961 SC 493
- (10) *Barium Chemicals Co. Ltd. v. Company Law Board*, AIR 1967 SC 303
- (11) *Rohtas Industries Ltd. v. S. D. Agarwal*, AIR 1969 SC 707
- (12) *M. A. Rasheed v. State of Kerala*, AIR 1974 SC 2249
- (13) *Technological Institute of Textile*, Civil writ-petition No. 3427 of 1972 (unreported judgment of Punjab and Haryana High Court)

- (14) *P. V. Jagannath Rao v. State of Orissa*, ILR 1968 Cut. 483
 (15) *Universal Industries and Cotton Mills Ltd. v. Union of India*,
 Civil Rule No. 4833 (w) of 1970
 (16) *State of Jammu and Kashmir v. Bakshi Gulam Mohammad and
 Another*, AIR 1967 SC 122
 (17) *Krishna Ballav Suhay v. Commission of Enquiry*, AIR 1969 SC 258
 (18) *P. K. Kunju v. State of Kerala*, AIR 1970 Kerala 252
Subrata Roychowdhury, Biswarup Gupta, R. N. Bajoria
and P. L. Khaitan ... for Appellant
Noni Coomar Chakraborti, Somendra Chandra Bose, R. N. Das
and Bhagabati Prasad Banerji ... for Respondents

The judgment of the Court was as follows :—

Common questions of law and facts are involved in these Rules. All these Rules were heard together. My judgment in C.R. 2529(w) of 1974 shall govern all other Rules.

2. In these Rules the petitioners challenge the validity of the notification dated 18.2.70 issued by the Central Government under Section 3 of the Commission of Inquiry Act, 1952, appointing a Commission of Inquiry known as "Sarkar Commission". In particular, item Nos. 2, 4, 9, 11, 12 and 13 of the Schedule 'C' to the said notification. The main grounds of challenge are that, these items are vague, indefinite and not definite matters of public importance : some of the matters had already been inquired into by the various departments of the Government, measures and actions had already been taken, as such those matters could not form the subject matter of further inquiry by the said Commission.

3. The petitioner is a public limited company under the Indian Companies Act, 1913. It is one of the largest paper producing concern in India. On May 1, 1967 the Government announced to appoint a committee to go into basic question regarding the functioning of licensing system during the last 10 years. On July 22, 1967 the Government appointed an expert committee headed by Prof. M. S. Thacker to inquire into the working of licensing system during the last 10 years with a view to ascertain whether larger industrial houses have secured undue advantage over the other applicants in the matter of issue of licenses. After resignation of Prof. Thacker, Sri Subimal Dutt became the Chairman of the committee. In July, 1967 Sri Chandrasekhar, a member of Parliament, submitted a memorandum to the Prime Minister containing various allegations against Birla companies including the petitioner. Allegations were also made against the petitioner with regard to license capacity of the paper mill units at Amlai and Brajrajnagar and relating to the forest lease granted to Amlai Unit. On August 25, 1967 the Central Government sent abstracts of the allegations made in the said memorandum of Sri Chandrasekhar to Dutt committee and requested it to look into the said allegations since they had a bearing on industrial licensing. The Dutt committee was

invested with powers under the Commissions of Inquiry Act, 1952. In September and December, 1967, two further memoranda were submitted by Sri Chandrasekhar to the Prime Minister containing allegations against Jute Mills, Paper Factories etc. in Birla group of concerns and also alleging evasion of payment of excise duty in respect of certain quality of paper manufactured by the petitioner. In February, 1969 report of detailed investigations made by various Ministries about the allegations made in three memoranda of Sri Chandrasekhar were laid before Rajya Sabha. The report found ; (i) no instance of assessment of kraft paper at lower rate applicable to printing and writing paper and (ii) the other allegations relating to inflating of cost structure etc. were too vague and general. It is stated in paragraph 14 of the petition that on March 5, 1969 the then Dy. Prime Minister Sri Morarji Desai stated in Rajya Sabha that demand for excise duty had been quashed by Delhi High Court and no evidence of any organised evasion of duty or collusion with Central Excise Staff was found. On March 10, 1969 Late Fakiruddin Ali Ahmed, the Former Minister of Industrial Development stated in Rajya Sabha that there was no substance on the basis of which the matter could be referred to a Commission of Inquiry. A resolution was moved in Rajya Sabha for the appointment of a Commission of Inquiry but that resolution was lost. Thereafter, on April 25, 1969 a similar resolution was moved in Parliament for the appointment of a Commission of Inquiry but that was also lost. In July, 1969, the Dutt committee submitted its report recommending revision of the industrial licensing policy to make it more purposeful and effective. On July 23, 1969, a supplementary report was submitted by Dutt committee dealing with the allegations concerning industrial licensing made against Birla group of industries contained in the memorandum of Sri Chandrasekhar. On August 25, 1969 Sri Fakiruddin, Ali Ahmed stated in Rajya Sabha that the Government would take action to appoint a Commission of Inquiry in respect of the cases where the Dutt committee had stated that it was not possible for them to give their views as all the facts were not before them and affected parties were not given opportunity to place their cases. On August 28, 1969, the proposal to appoint the Commission of Inquiry was brought before the Central Cabinet and the Cabinet approved the proposal of such appointment at a meeting held on 28th August, 1969. On August 29, 1969 the Government at the highest level decided to appoint a commission of inquiry, announcement of which was made through a statement by the Minister of Industrial Development, Internal Trade & Company Affairs in Rajya Sabha. It was stated by the Minister that in view of certain lapses, improprieties and acts of commission and omission as referred to in the Dutt committee's report which were definite matters of public importance, full and comprehensive inquiry was necessary in respect of the above cases. It was, therefore, decided to set up a commission of

inquiry under the Commission of Inquiry Act, 1952 to go into all these matters. On February 18, 1970 a notification was issued by the Central Government under Section 3 of the Commission of Inquiry Act, 1952 hereinafter referred to as "the Act", appointing a Commission of Inquiry consisting of Sri A.K. Sarkar, Former Chief Justice of India, for a full inquiry into the matters referred to in the said notification and to determine the measures which were necessary to prevent the recurrence of such irregularities, lapses or improprieties. On October 22, 1970, the petitioner wrote a letter to the respondent No. 5 stating that the matters set out in Schedules 'B' and 'C' were vague and indefinite and it was impossible for the petitioner to know the allegations against it. Between February, 1971 to April, 1974 various letters were exchanged between the petitioner and the officers of the inquiry commission relating to supply of various informations. On September 29, 1973 a letter was received by the petitioner from the Joint Director, Inspection stating that it was necessary to examine how land covered by Factory was utilised and the cost incurred for construction of different assets on land. The petitioner was required to furnish informations as per proforma enclosed in the said letter. It was urged before the commission that the allegations in Schedule 'C' into which the inquiry had been directed were vague. It

urged that the vagueness of the matter to be inquired into, made it difficult to commercial houses to collect the necessary evidence to meet the cases against them. On 7th November, 1973 the petitioner sent a letter to the Joint Director, Inspection stating that the allegations under item No. 4 of the Schedule 'C' to the terms of reference would be justified when there was some prima facie allegations against the company relating to defrauding or attempt to defraud the Government of its legitimate revenue and/or any unauthorised retention of foreign exchange abroad by manipulation of invoice on the value of the goods imported or exported during a particular period. There was no such allegation with reference to which the information sought for by the Commission might be considered relevant. On 2nd April, 1974, the Additional Director wrote a letter to the Principal Officer of the petitioner company wherein it was stated that in the Commission's opinion on item no. 4 of Schedule 'C' was specific enough to justify the inquiry proposed to be made by the Commission and if, however, the petitioner felt that the view taken by the Commission was not correct, then the only course was for the petitioner to go to Court and have the validity of interpretation of item no. 4 of Schedule 'C' determined. It was, therefore, decided that if the petitioner did not move the Court within a week, the Commission would be compelled to serve upon the petitioner summons and other processes necessary to get informations and documents required by it. Thereafter, on 8th May 1974 the petitioner filed the present application under Art. 226 of the Constitution and obtained a Rule and a limited order of

injunction by which the enquiry with respect to the matters referred to in Schedule 'C' to the notification had been stayed. As a matter of fact the Commission did not conclude its inquiry into the matters referred to in Schedules 'A' and 'B' to the notification.

4. In Schedule 'C' to the notification dated 18th February, 1970 it is stated "allegations relating to the Birla Group of concerns on which further investigation needs to be made in the public interest." In the Preamble of the said notification it is also stated "while a few others are pending further investigation." Items No. 2, 4, 9, 11, 12, and 13 of the Schedule 'C' to the notification are set out herein below :—

2. Whether, and if so the circumstances in which, large salaries have been and are paid to the wives and other relatives of high executives of the Birla Group of concerns without any service or inadequate service being rendered by them in recompense.

4. Whether there was—

(i) any defrauding or attempt to defraud Government of its legitimate revenues (including any case of defrauding, or attempt to defraud, through creation of trusts),

(ii) any unauthorised retention of foreign exchange abroad by manipulation of invoice values of the goods imported or exported during the said period or any other defrauding or attempt to defraud Government of foreign exchange.

Which has either not been detected or, if detected has been dealt with by the normal departmental authorities responsible for enforcement of the relative tax or foreign exchange laws improperly with a view to showing undue favour or giving unmerited benefit to the Birla Group of concerns.

9. Whether, and if so the circumstances and manner in which manufacturing concerns included in the Birla Group of concerns have indulged in inflating and manipulating their cost structure against the public interest.

11. Whether the Birla Group of concerns have derived any undue benefit by the employment of senior retired Government servants and whether such employment of retired senior Government servants involved any impropriety.

12. Whether the Birla Group of concerns employ a large number of 'Contactmen' and the extent to which these 'Contactmen' have influenced the commission of improprieties.

13. Whether any senior Government servant or well known politician has placed himself under obligation to the Birla Group of concerns by receiving free treatment at the Bombay Hospital run by them.

At the outset Mr. Noni Coomar Chakraborti, appearing on behalf of the respondents raised certain preliminary objections as regards

maintainability of the present writ petition. I propose to deal with those points first.

5. It is contended by Mr. Chakraborti that this Court has got no territorial jurisdiction to entertain the petitioner's application under Art. 226 of the Constitution as no part of the cause of action has arisen within the jurisdiction of this Court. The Registered Office of the Company is in Orissa. The notification was published in Delhi. The Commission sent the requisitions addressed to Orissa Office of the petitioner company. There is nothing in the petition to show that what part of the cause of action has arisen within the territorial limits of this Court.

6. Mr. Roychowdhury, appearing on behalf of the petitioner contended that it would appear from the cause title of the petition that the respondents 2, 3 and 4 i. e. the Commission has a regional office and it functions within the jurisdiction of this Hon'ble Court. It is further submitted that requisitions have been made from the Calcutta Regional Office to the petitioner at its Calcutta Office and have been answered by the Calcutta Office and sent to the Regional Office of Commission. My attention was drawn to page 142 of the petition. A letter dated 29th September, 1973 written by the Joint Director (Inspection) from Regional Office of the Commission at 15, Ganesh Chandra Avenue, Calcutta-13, to the Principal Officer M/s. Orient Paper Mills Ltd., 9/1, R. N. Mukherji Road, Calcutta-1, Letter dated 2nd April, 1974, was also written from the Regional Office to the Principal Officer of the petitioner company at No. 9/1, R. N. Mukherji Road, Calcutta.

7. It is well settled that where a part of cause of action arises within the jurisdiction of a particular Court, that Court gets the jurisdiction to entertain an application under Art. 226 of the Constitution.

8. It is next contended by the respondents that the petitioner's petition does not fall within clauses (a), (b) or (c) of Art. 226(1) of the Constitution. There has been no violation of the petitioner's fundamental right. No injury or substantial injury has been sustained. It is argued that the object of appointment of the Commission is to inform the government's own mind regarding some matters of public importance in order to enable the government to make up its own mind as to what legislative or administrative remedial measures can be adopted. Reference was made to decision of the Nagpur High Court in (1) *M. V. Razwade v. Dr. S. M. Hassan*, AIR 1954 Nag. 71 wherein the Nagpur High Court held that the Commission governed by the Commission of Inquiry Act 1952 is appointed by the State Government for the information of its own mind.

* * * It is, therefore, a fact finding body meant only to instruct the mind of the government without producing any document of a judicial nature. The Court further observed that there is no accuser, no accused and no specific charges for the trial before the Commission, nor is the government, under the law required to pronounce one way or the other

other on the findings of the Commission. Those observations of the Nagpur high Court were approved by the Supreme Court in (2) *Brajanandan Sinha v. Joti Narayan*, (AIR 1956 SC 66). At page 75 of the report the Supreme Court observed that it is, therefore, clear that the power conferred by Parliament on the Central Government to appoint a Commission of Inquiry under Section 3(1) of the Act for the purpose of finding facts in regard to the allegations of corruption, favouritism and nepotism against the said Chief Minister cannot be held to constitute interference with the executive functions of the State Government.

9. It is stated in the petition that the petitioner has suffered substantial injury by reason of being subjected to oppressive requisitions issued by the officers of the Commission.

10. It is not correct to say that there could be injury only if there is a trial or punishment. If the entire proceeding is found to be without jurisdiction and the conditions precedent for appointing the Commission under Section 3 of the Act were not fulfilled as alleged by the petitioner, in that case subjecting the petitioner, to such a proceeding itself is a substantial injury. In (3) *Gulab Kanwar v. Enforcement Officer*, AIR 1977 Calcutta 383 this Court observed: "It will be unjust to compel the petitioner to appear before the authorities in respect of the proceedings which I have held to be initially void."

11. If the petitioner can satisfy the court that the subject matter of the inquiry is not definite matters of public importance, in that case the Commission shall have no power to inquire into the matters with respect to which the requisitions have been sent. So, in my view, the petitioner's writ petition comes under Art. 226 (1)(b) of the Constitution.

12. It is next argued by Mr. Chakravorti that there has been inordinate delay in moving this Court inasmuch as the notification was issued in February, 1970 and the petitioner came before this Court in May, 1974. No explanation has been offered by the petitioner in the petition of the reason for such delay. Reliance was placed upon the decision of the Supreme Court in (4) *Rabindra Nath Bose v. Union of India*, AIR 1970 SC 470.

13. It is contended by Mr. Roychowdhury that where a writ of prohibition is asked for, and where there is an inherent lack of jurisdiction, "delay" is no ground for refusing the relief. The writ of prohibition would go as a matter of course if there is a lack of jurisdiction.

14. Reliance was placed on the decision of the Supreme Court in (5) *Sheo Nath Singh v. Appellate Assistant Commissioner of Income-tax*, 82 ITR 147.

15. *Rabindra Nath Bose's* case as referred to by Mr. Chakravorti has got no application to the facts and circumstances of the present

case. In that case the petitioner filed a petition under Art. 32 of the Constitution in 1969 challenging the seniority list of the Income-tax Officer, Class I Grade II prepared in 1953. Under those circumstances, the Supreme Court observed that it would be unjust to deprive the officers of the rights which have accrued to them. In the instant case there is no question of any third party acquiring any right since 1970.

16. In *Sheo Nath Singh's* case a notice was issued on 5th November, 1954 to the assessee under Section 34(1) (a) of the Income-tax Act, 1922. Seven years thereafter, in 1961, the assessee filed a petition under Art. 226 of the Constitution in this Court. That delay of five years was not considered a bar to get the relief in the writ petition.

17. The petitioner has stated in paragraph 97 of the petition that earlier it did not move any application in order to avoid unnecessary litigation. When the matter became oppressive, the petitioner had no other alternative but to approach the Court. The Commission itself asked the petitioner to approach the Court to have the issue thrashed out if the petitioner took the view that the Commission had exceeded its jurisdiction and not properly interpreted the scope and the terms of reference. The Commission allowed time to enable the petitioner to approach the Court. It was in that context a letter was written to the Commission wherein it was stated that it was not possible to move the Court immediately by reason of exodus of counsel during Easter Vacation and power failure.

18. In my view, the delay of four years is not very fatal and for that reason the petition cannot be thrown out, where the jurisdiction of the Commission to inquire into the matters has been challenged in the present petition. Moreover, the question of delay does not arise where a writ of prohibition is asked for.

19. Lastly it is contended by the respondents that the petitioner has submitted to the jurisdiction of the Commission. Letters and requisitions issued by the Commission have been complied with by the petitioner from time to time and as such the petitioner is estopped from challenging the jurisdiction of the Commission in the present application inasmuch as it cannot approbate and reprobate.

20. In the instant case the petitioner has challenged the jurisdiction of the Commission. It is well settled that by acquiescence no jurisdiction can be conferred in a case where there is an inherent lack of jurisdiction. If the petitioner can satisfy the Court that the appointment of Commission is without jurisdiction in that case, their acquiescence might not itself be a bar for denying the relief asked for. It does not appear from the conduct of the petitioner that it is approbating and reprobating.

21. All the preliminary objections raised by the respondents fail.

22. It is contended by Mr. Subrata Roy Chowdhury, appearing on behalf of the petitioner that the notification dated 18th February, 1970 has not been expressed in the name of the President of India as required by Art. 77(1) of the Constitution and as such it is void. It is further contended that the said order has not been authenticated in the manner specified in the Rules made under Art. 77(2) of the Constitution. No decision to appoint the Commission was taken by the Cabinet with regard to Schedule 'C' to the notification inasmuch as in the speech of the Minister for the Industrial Development, Internal Trade and Company Affairs reference was made only to certain lapses, improprieties and acts of Commission and omission referred to in Dutt Committee's report. But there was no reference with respect to the allegations of Sri Chandra Sekhar as referred to in Schedule 'C' to the notification. According to Mr. Roychowdhury, the decision of the Cabinet, if any, was only with regard to Schedule 'A' and 'B' to the notification. Although challenge has been thrown that there was no decision by the Cabinet, there was no averment in the affidavit-in-opposition that the Cabinet took decision with regard to Schedule 'C' to the notification.

23. Mr. Chakraborty, appearing on behalf of the respondents contended that Art. 77 was almost equivalent to Art. 166 of the Constitution. The effect of non-conformity of clauses (i) and (2) of Art. 77 did not render the order a nullity. It was further contended that similar notifications in (6) *Dalmia's* case AIR 1958 SC 538 and (7) *Karnataka's* case (AIR 1978 SC 68) were upheld by the Supreme Court.

24. A supplementary affidavit was affirmed on 2nd of March, 1978 by S. C. Marthe, the Secretary Government of India, Ministry of Industry (Department of Industrial Development) wherein it is stated that the said notification expressly states that the Central Government hereby appoint a Commission of Inquiry. Under Section 3(8) of the General Clauses Act, 1897 the words "Central Government" in relation to anything done or to be done after the Constitution is expressly taken in the name of the President. Art. 77(1) of the Constitution is complied with. The said order dated 18.2.70 is signed by the Secretary to the Government of India, Department of Industrial Development who is authorised to authenticate under Rule 2(1) of the Authentication (Order and Other Instruments) Rules, 1958. The proposal to appoint a Commission of Inquiry concerned was brought before the Central Cabinet and the Central Cabinet approved the proposal of such appointment at a meeting held on August 28, 1969. At a meeting of the Cabinet dated 6th January, 1970, it was decided that urgent steps should be taken to see that the Commission starts functioning early. This was done under the Transaction of Business Rule made by the President under Art. 77(3) of the Constitution, "The document relating to the appointment of the Commission of Inquiry made under the said order/notification

dated 18.2.70 relate to the affairs of the State and I claim privilege for non-production of the same records under Section 123 of the Indian Evidence Act." Under Art. 77 all executive actions of the Government of India shall be expressed to be taken in the name of the President. Art. 77(2) provides that orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President. Art. 77(3) enables the President to make Rules for the more convenient transaction of the business of the Government of India and for the allocation of the said business. It has been held consistently by Courts that the requirements of Art. 77(1) and (2) are merely directory and not mandatory. The Government, if necessary, can lead evidence to prove that the proceedings were taken according to the requirements of the Constitution and the Rules. It is stated in the supplementary affidavit that under Rule (2)(i) of the Authentication (Order and Other Instruments) Rules, 1958, the Secretary to the Government of India, Department of Industrial Development is authorised to authenticate and the present notification has been signed by the Secretary to the Government of India, Ministry of Industrial Development, Internal Trade & Company Affairs (Department of Industrial Development). The Courts are entitled to presume that the official acts are done in a proper manner. In (8) *State of U. P. v. O. P. Gupta*, AIR 1970 SC 679, the Supreme Court in dealing with an order made by the Government of United Province, signed by the Chief Secretary, held that the provisions of Art. 166(i)(2) are directory and substantial compliance with those provisions is sufficient. The Court further held that the impugned order in that case was made in the name of the State Government and it was signed by the Chief Secretary and that, therefore, *prima facie* it is a valid order, and that the Court need not go further. The decision of the Cabinet, however, was not produced before the Court as the privilege was claimed by the Secretary to the Government of India under Section 123 of the Evidence Act as that document relates to the affairs of the State. In (9) *State of Punjab v. S. S. Singh*, AIR 1961 SC 493, Gajendragadkar, J. (as he then was) observed: what are the affairs of State under Section 123? In the latter half of 19th Century affairs of State may have had comparatively narrow content. Having regard to the notion about governmental functions and duties which then obtained, affairs of State would have meant matters of political or administrative character relating, for instance, to national defence public peace and security and good neighbourly relations. Thus, if the contents of the documents were such that their disclosure would affect either the national defence or public security or good

neighbourly relations they could claim the character of a document relating to affairs of State. There may be another class of documents which could claim the same privilege not by reasons of their content as such, but by reasons of the fact that, if the said documents were disclosed, they would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies.

25. It is well settled that the privilege should not be claimed under Section 123 because it is apprehended that the document if produced would defeat the defence raised by the State. In the supplementary affidavit when privilege is claimed concerning a particular document, the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to the affairs of the State then it should reject the claim for privilege and direct its production.

26. The first clause of section 162 of the Evidence Act requires that a witness summoned to produce a document must bring it to the Court and then raise an objection against either its production or its admissibility. An objection to the production or admissibility of evidence specified in Section 162 of the Evidence Act relates to all claims of privilege provided by the relevant sections of Chapter IX of Part III of the Act. Section 123 is only one of such privileges. So the jurisdiction given to the Court to decide the validity of the objections covers not only the objection raised under Section 123 but to all other objections as well.

27. The affidavit does not indicate that the person making the affidavit is satisfied that its disclosure would lead to public injury. Mr. Chakravorty submitted before the Court that although privilege was claimed with respect to the decision of the Cabinet, but for the satisfaction of the Court the said decision would be produced before the Court. But that was not done. So, in the absence of any material, I shall have to rely upon the averments made in the supplementary affidavit that there was a decision of the Cabinet with respect to impugned notification, which obviously includes all the three schedules viz. 'A', 'B' and 'C'. In the petition no specific statement has been made that with respect to schedule 'C' to the notification there was no decision by the Cabinet. Under Art. 74 of the Constitution, the President is to act in accordance with the advice of the Council of Minister and under Art. 74(2) the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court. There is no constitutional obligation binding the President to act only in conformity with the ministerial advice. Art. 361(1), again expressly provides that the President shall not be answerable to any Court for any act done or purported to be done by him in the performance of the duties of his office. No member of the Cabinet can disclose Cabinet deliberations to anybody outside the Cabinet, without the Prime Minister's permission.

28. In my opinion, a decision of the Cabinet relates to the affairs of the state as it affects the integrity of the Cabinet in determination and execution of public policies and for non-production of the same privilege can be claimed under Section 123 of the Evidence Act.

29. It is next contended by Mr. Roychowdhury that under section 3 the power of the Government is discretionary when it acts on its own, whereas it is mandatory to appoint a commission if so directed by a resolution of House of People. It is argued that the Government could not exercise its discretionary power under Section 3 of the Act contrary to the decision of Parliament itself, when a resolution moved in the both Houses of parliament for appointing a Commission with respect to the allegations of Sri Chandra Sekhar which are the subject matter of Schedule 'C' to the notification were defeated in Rajya Sabha and Lok Sabha on 10th of March, 1969 and 25th April, 1969 respectively. Under Rule 182 of the Rules of Procedure and conduct of business in Lok Sabha a resolution on the same matter could not be moved before one year i.e. before 25th of April, 1970. The Government which is a creature of Parliament and is responsible to it decided in the aforesaid circumstances to appoint a Commission on 8th of February, 1970. It is contended that the scheme of section 3 of the Act makes it abundantly clear that concurrent sources for appointing the commission must be simultaneously available at a particular point of time.

30. Rule 182 of the Rules of Procedure and conduct of business in Lok Sabha provides that when a resolution has been moved no resolution or amendment raising substantially the same question shall be moved within one year from the date of the moving of the earlier resolution. Provided that when a resolution has been withdrawn with the leave of the house no resolution raising substantially the same question shall be moved during the same session.

31. It is contended by Mr. Chakravorty that under Art. 122 of the Constitution the validity of any proceeding in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

32. Clause 1 of Art. 122 provides that Courts will not be entitled to question the validity of any proceeding in Parliament on the ground of irregularity of procedure. There is no question of application of the provisions of Art. 122 of the Constitution inasmuch as no irregularities of procedure with respect to a resolution was challenged by the petitioner. The question is whether, a Government who is responsible to Parliament can act contrary to the resolution of Parliament in exercising its discretionary power to appoint a commission under Section 3 of the Act. Section 3 of the Act has got two parts. It confers power upon the Central Government to appoint a commission if there exists definite matter of public importance and forms an opinion that it is necessary so to do. The appointment of such commission is discretionary. But in case where there is

a resolution either by the House of People or by the Legislative Assembly of the State, it is obligatory upon the appropriate government to appoint a commission of inquiry. Two parts are mutually exclusive. The sources are also different. Obligation on the government to appoint a commission arises only when there is a resolution by the House of People. When a resolution to appoint a Commission is lost in Parliament, in that case there is no resolution and accordingly, it is not obligatory upon the Government to appoint a commission. The discretionary power to appoint a commission, however, is not fettered when the resolution to appoint a Commission is lost in Parliament. My reading of Section 3 of the Act is that, where two sources of powers of appointing the Commission are distinct and different, obviously, it cannot be exercised simultaneously. There is no bar to appoint a commission by the Government in exercising its discretionary power even when a resolution to appoint a Commission is lost in Parliament inasmuch as it does not attract the other part of Section 3 of the Act.

33. It is next urged by Mr. Roychowdhury, that the matters referred to in schedule 'C' to the notification are not definite matters of public importance and no opinion was formed by the Government that it was necessary to appoint a Commission of Inquiry. According to Mr. Roychowdhury the conditions precedent for exercising powers under Section 3(1) of the Act did not exist and had not been complied with. The allegations made in the three memoranda of Sri Chandra Sekhar could not constitute any material for formation of any opinion for appointment of a Commission of Inquiry in view of the fact that with respect to most of those allegations thorough investigation by the different agencies of the government had already been made. On investigation it was found that the allegations were baseless. The resolution for appointment of a Commission under the Act with respect to those allegations was put to vote in Rajya Sabha and was lost by a large majority. Similar motion in Lok Sabha also was not carried out. In fact there was nothing pending further investigation as stated in the Preamble as well as in Schedule 'C' to the notification.

34. It is contended by Mr. Chakravorty appearing for the respondents, that even assuming in the instant case that the matters referred to in Schedule 'C' are not definite matters of public importance, in respect of various questions put in Parliament from time to time and the statements made by the Ministers thereon, the Commission has jurisdiction not only to hold an inquiry in matters of public importance, but also for the purpose of "performing such functions" as may be specified in the notification. Reliance was placed upon the observations of the Supreme Court in *Dalmia's* case (AIR 1958 SC 538).

35. At page 544 of the Report, the Supreme Court observe "that quite conceivably the conduct of an individual person or company or group

of individual persons or companies may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well being as to make such conduct a definite matter of public importance urgently calling for a full inquiry. Besides, Section 3 authorises the appropriate Government to appoint a Commission of Inquiry not only for the purpose of making an inquiry into a definite matter of public importance *but also for the purpose of performing such functions as may be specified in the notification*. In Paragraph 13 at page 549 of the Report, the Supreme Court further observed that it would be apparent from its long title that the purpose of the Act is to provide for the appointment of Commissions of Inquiry and for vesting such Commissions with certain powers. Section 3 empowers the Government, in certain circumstance therein mentioned, to appoint a Commission of Inquiry for the purpose of making an inquiry into definite matter of public importance and performing such functions within such time as may be specified in the notification. It seems clear and it has not been controverted that on a proper construction of this section, the functions the performance of which is contemplated must be such as are ancillary to and in aid of the inquiry itself and cannot be read as a function independent of or unconnected with such inquiry. That being the position the question arises as to the scope and ambit of the power which is conferred by it on the appropriate Government. The answer is furnished by the statute itself, for section 3 indicates that the appropriate Government can appoint a commission of inquiry only for the purpose of making an inquiry into any definite matter of public importance and into no other matter. In other words the subject matter of the inquiry can only be a definite matter of public importance. The appropriate Government it follows, is not authorised by this section to appoint a Commission for the purpose of holding any inquiry into any other matter.

36. In *Dalmia's* case the Supreme Court held that an inquiry could be directed if there exists matter of public importance. Once there is a definite matter of public importance and the conditions precedent for appointment of the Commission are satisfied, then the Government may require the commission to perform such ancillary or incidental functions as may be specified in the notification. The functions specified in the notification of the Commission can only be those which are in aid of or for the purpose of conducting the inquiry into a definite matter of public importance. Where a Commission has been appointed to inquire into the definite matter of public importance, in that case, the question of its performing such functions as specified in the notification only arises.

37. It is next contended by Mr. Roychowdhury that formation of opinion has to be made on relevant materials which must have nexus with the object sought to be achieved and such an opinion cannot be

formed on extraneous or irrelevant consideration. If a challenge is thrown by the aggrieved person questioning the existence and/or formation of such opinion, then it is incumbent upon the government to disclose to the court the materials on the basis of which such opinion was formed. The Court cannot examine the sufficiency of the materials, but at the same time it is entitled to ascertain whether there are any relevant materials on the basis of which any opinion had been or could be bonafide formed as required under section 3(1) of the Act. It is urged by Mr. Roychowdhury that the principles as laid down by the Supreme Court in (10) *Barium Chemicals Co. Ltd v. Company Law Board* (AIR 1967 SC 203), (11) *Rohtas Industries Ltd. v. S. D. Agarwal*, (AIR 1969 SC 707), (12) *M. A. Rasheed v. State of Kerala*, (AIR 1974 SC 2249) would be applicable in construing section 3 of the Act.

38. It is urged by the respondents that the ratio of the decision of the Supreme Court in *Barium Chemicals and Rohtas Industries's* case have no application in a case under section 3 of the Act. Under sub-clause (b) of section 237 of the Companies Act, the authority of the Central Government to set up an investigating agency was circumscribed by three circumstances enumerated therein. In other words if one or more of the circumstances mentioned in sub-clause (b) of section 237 did not exist; the Central Government could not set an investigating agency. No such circumstances are prescribed for or limitation imposed upon the Government for setting up a Commission of Inquiry under Section 3 of the Act. The power of the government for setting up a Commission of Inquiry is unfettered as compared to the limitation imposed under sub-clause (b) of section 237 of the Companies Act. Reliance was placed by Mr. Chakravorty upon an unreported judgment of Punjab and Haryana High Court in the case of (13) *Technological Institute of Textile*, in Civil Writ Petition No. 3427 of 1972.

39. In that unreported, judgment, the learned Single Judge of the Punjab and Haryana High Court observed that the ratio of *Barium Chemicals and Rohatas Industries'* cases are not applicable for setting up a Commission of Inquiry under Section 3 of the Commission of Inquiry Act inasmuch as no circumstances as envisaged in sub-clause (b) of Section 237 of the Companies Act exist for setting up a Commission of Inquiry under Section 3 of the Commission of Inquiry Act.

40. In *Dalmia's* case the Supreme Court referred to the condition precedent for exercise of powers under Section 3 of the Act and said that the Government can order an inquiry only into a definite matter of public importance and no other matters. In (7) *Karnataka State v. Union of India*, AIR 1978 SC 68 at 172 Kailasam, J. observed referring to the decision of the Court in *Dalmia's* case, "The Court also held that the Act does not delegate to the government any arbitrary and / or uncontrolled power and does not offend Art. 14 of the Constitution. The Court

further observed that the discretion given to the government to set up a Commission of Inquiry is guided by the policy laid down in the Act and the executive action is to be taken only where there exists a definite matter of public importance into which an inquiry is necessary".

41. In (12) *M.A. Rasheed v. State of Kerala*, AIR 1974 SC 2249 the Supreme Court said that in all statutes where such expression as "opinion's", "reason to believe", "satisfied" are used, the Court would not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of Law or fact upon which the validity of the exercise of the power is predicated. Where a reasonable conduct is expected the criterion of reasonableness is not subjective, but objective. Administrative decisions in exercise of power even if conferred in subjective terms must be made in good faith and on relevant considerations. The Courts would inquire whether a reasonable man could have come to that decision in question, without misdirecting himself on the law and facts. The Courts will find out whether the condition precedent to the formation of the opinion have a factual basis.

42. In (14) *P. V. Jagannath Rao v. State of Orissa*, ILR 1968 Cuttack 483, a Division Bench of the Orissa High Court held that the conditions for arriving at subjective satisfaction may vary in different statutes, but the principle enunciated in *Barium Chemical's* case has full application in a case under the Commission of Inquiry Act, 1952. The Court observed that the subjective satisfaction would not empower the State Government to appoint a Commission, in the absence of definite matters of public importance. The Court has got the power of judicial review within a very narrow compass as to whether there are materials to prove atleast *prima facie* existence of definite matters of public importance. If a tentative conclusion can be arrived at on the allegations made, it is not open to the Court to go further and quash the Notification on the ground of insufficiency or impropriety of those materials. When the existence of definite matters of public importance is challenged, mere assertion on the part of the State Government that those matters existed would not be enough. Some clue must be furnished which led to the conclusion as to their existence.

43. With great respect, I am unable to share the view of the learned Judge of the Haryana and Punjab High Court that the principle as laid down by the Supreme Court in *Barium Chemicals and Rohtas Industry's* case is not applicable to a case under Section 3 of the Commission of Inquiry Act, 1952. Under Section 237(b) of the Companies Act, discretion has been conferred upon the Central Government. Three circumstances are set out in sub-clause (i), (ii) or (iii). The formation of opinion is not doubt subjective but there must exist the circumstances upon which that opinion could be formed. Similarly under section 3 of the Commission of Inquiry Act, the formation of opinion of the

Government is also subjective but only one condition or circumstance has been prescribed viz. the subject matter of the inquiry must be definite matter of public importance. So, the exercise of power or formation of opinion under section 3 of the Act is limited or restricted only to definite matters of public importance. Factual existence of those materials are absolutely necessary. Those matters might be spelled out from the face of the order itself or by disclosing matters in the affidavit of the Government when a challenge is thrown by the aggrieved party about the non existence of definite matter of public importance.

44. There is no bar to appoint a Commission of Inquiry by the Government and refer those particular matters to the Commission for inquiry even if those matters were previously investigated with and inquired into by different agencies of the Government and departmental findings were accepted by the Government provided those matters are definite matters of public importance.

45. In Civil Rule No. 4833(W) of 1970, (15) *Universal Industries and Cotton Mills Ltd. v. Union of India*, Item No. 5 of Schedule 'C' of the present notification was challenged. In that case it was also urged on behalf of the petitioner that there were no grounds or materials whatsoever for ordering any investigation against the petitioner in the facts and circumstances of that case. The respondent No. 1 in any event had no material whatsoever to form an opinion that any such investigation or inquiry against the petitioner was of any definite matters of public importance. In that case the Court found that there was an opinion of the Additional Solicitor General and the Additional Solicitor General with respect to the petitioner's Company was of opinion that the facts and circumstances did not establish any case against the company or its Directors and it would not be worthwhile to pursue the matter any further. The issue involved was not of much importance. This Court held that in view of the fact that the matter involved in the petitioner's case was not any definite matter of public importance and moreover, the requisite opinion was not formed by the appropriate Government upon consideration of any relevant materials, the impugned notification referring the petitioner's case to the Commission for inquiry had been set aside. It appears that item 5 of Schedule 'C' to the notification has already been quashed by this Court on 10th of December, 1976. No appeal has been preferred against the said decision.

46. In (16) *State of Jammu & Kashmir v. Bakshi Gulam Mohammad & Anr*, AIR 1967 SC 122, the Supreme Court held that a Court can decide whether the matters to be inquired into are definite matters of public importance. The Court observed that "Definite" in this connection means something which is not vague. It further held that in most cases the acts were identifiable from the particulars given in the second

Schedule in respect of them and that the note drawing attention to the government of the charges does not indicate any indefiniteness.

47. In (17) *Krishna Ballabh Sahay v. Commission of Inquiry*, AIR 1969 SC 258, the Supreme Court considered the charges and found them to be specific. In paragraph 11 the Court observed "We have read the charges which are to be investigated. ***We can only say that each charge refers in detail to events with date, names of persons concerned, particulars of action taken and the conduct which is to be considered. The charges are such that we think that an inquiry can be ordered. If charges were vague or speculative suggesting a fishing expedition we would have paused to consider whether such an inquiry should be allowed to proceed. A perusal of the grounds assures us that the charges are specific and the records rather than oral testimony will be used to establish them. We agree with the High Court that the affidavit-in-opposition makes a specific case for inquiry.

48. The ratio of the above decisions laid down the following principles :- (a) the courts are competent to decide whether the matters to be inquired into are definite matters of public importance (b) the power conferred upon the Central Government under Section 3 of the Act is neither unfettered nor uncontrolled and (c) the Central Government can appoint a Commission of Inquiry only when there exists a definite matter of public importance into which an inquiry is necessary.

49. So, the point for consideration in the instant case is, whether the items referred to in Schedule 'C' to the notification are definite matters of public importance. It is contended by the respondents that some of the items referred to in the notification in *Dalmia's* case and *Jagannath Rao's* case are similar to some of the items referred to in Schedule 'C' to the present notification. According to Mr. Chakravorty these are definite matters of public importance inasmuch as the public share-holders are very much interested and concerned as they would be deprived of earning dividends on their holdings, if large salaries are paid to the wives and other relatives of the senior executives of Birla group of concerns when the recipients of the salaries do not work at all nor do they make any contribution to the company. It is urged by Mr. Chakravorty that items 2, 4 and 9 of the Schedule 'C' to the notification are not vague and indefinite and are definite matters of public importance.

The term of reference in *Dalmia's* case and *Jagannath Rao's* case are not similar to those in the instant case. In *Dalmia's* case numerous complaints were made by the shareholders of the companies concerned. The investing public had lost money in large amount in the said concern and the matter was considered to be of public importance by reason of the fact that large amount of public money was involved. Numerous small investors had been affected by the conduct of the five persons as specified in the said notification. Particulars were given that companies were

being floated and were taken into voluntary liquidation. The names of the persons who are exercising control, the total amount of subscription obtained from the public, motives of investment, extent of the loss suffered—these are all specific matters. In *Dalmia's* case an affidavit was also filed by Sri H.M. Patel wherein full facts were given. In *Dalmia's* case the question of the vagueness of the notification was not involved. In *Jagannath Rao's* case also the notification itself specified that the Commission shall inquire into the detailed particulars pertaining to the matters which shall be placed before it by the State Government and such detailed particulars were in fact placed by State Government before the Commission. In the present case there is no such stipulation in the impugned notification.

50. The memoranda of Shri Chandra Sekhar was placed before the Court. In all there are 88 allegations and five sub-allegations. These allegations can be grouped under the following heads (a) Customs and Central Excise (b) Income-tax (c) Foreign Exchange Regulation Act (d) Insurance (e) Capital (f) Favour shown by separate State Governments (g) Employment of relatives and retired high government officials on large salaries (h) Employment of sons and wives of high executives (i) Manufacture of sub-standard products and high profiteering. Seven items have been referred to the State Government. They related to undue favours shown by the states concerned. (a) With respect to 20 items no prima facie case was made out on preliminary enquiry (b) with respect to 11 items, facts alleged were found substantially correct on preliminary inquiry but there was no illegality or impropriety calling for further action. (c) Six items already forwarded to Dutt's committee and Dutt committee could not complete investigation. These are subject matters of Schedule 'B' to the notification. (d) In 16 items prima facie violation of existing law on preliminary enquiry was found and actions have been initiated under the relevant provisions of law. (e) Six items are too vague or so general which do not require further investigation. These are 64 items out of 88 items. Only 24 items remain. Out of them 10 items have already been disposed of in the meantime. Only 14 items remain and these items form the subject matter of Schedule 'C' to the notification.

51. It is urged by the respondents that even if the Government has once decided not to appoint a Commission, it could change its opinion and decide to appoint a Commission on the same materials. There is no bar in Section 3(i) of the Act for changing opinion. In support of their contentions, the respondents relied upon the decision in (14) *P. V. Jagannath Rao & Ors. v. State of Orissa*, AIR 1969 SC 215.

52. In *Jagannath Rao's* case the decision not to appoint a Commission was taken by the State Government before investigation was made

into the charges and any governmental finding was given. The Successor State Government reviewed the decision of the earlier Government which had taken a decision not to appoint a Commission to inquire into its own conduct. The decision not to appoint a Commission after investigation was taken only by the Central Government and it did not change its view. No doubt Government can change its subjective opinion to appoint a Commission because it was not necessary to do so at a particular time even when definite matters of public importance were in existence. But by changing its opinion the Government cannot change an indefinite matter or matter of no importance into a "definite" matter of public importance where in fact such matters did not exist. If the opinion was changed on subsequent acquisition of such materials which could be regarded as definite matters of public importance, then those new facts must be disclosed. In the present case there is no such disclosure.

53. Moreover, in *Jagannath Rao's* case the Supreme Court found, that the purpose of setting up the Commission of Inquiry in that case was, to promote measures for maintaining purity and integrity in the administration and in the political life of the State and not the character assassination of Biren Mitra and Biju Patnaik Ministries and their group as alleged by the petitioners. In (16) *Bakshi Gulam Mohammad's* case AIR 1967 SC 122 the Supreme Court found that the matters referred to the Commission were definite matters of public importance and these were "definite" as they were not vague. The Supreme Court observed that public men should be called upon to face the consequences if they fail in their duty. The Commission was concerned with 38 instances dealing with abuse of official position and of the assets of Bakshi Gulam Mohammad. The Supreme Court observed ; "this was necessary for the purpose of ensuring cleanliness of public life".

54. In (17) *Krishna Ballav Sahay's* case AIR 1969 SC 258, the Commission of Inquiry was directed against Ex Chief Minister by the succeeding Ministry. The Supreme Court found on perusal of the grounds given in the notification that the charges were specific. The Court further found that the affidavit-in-opposition filed on behalf of the Government had made out a sufficient case for inquiry.

55. The petitioner has prepared an elaborate and comprehensive chart. Perusal of the chart would show that item No. 2 deals with the question of large salaries paid to wives and relatives or executives of the Birla Group of Concerns without any service or inadequate service being rendered by them in recompense.

56. It is urged by the petitioners that nothing is indicated what is meant by "large salaries" or by high executive or by relative. It is not indicated as to whether the largeness of salary is dependent upon the mere quantum of the payment or with reference to the service rendered. It may be that the salary of Rs. 1,000/- is not at all high for a qualified executive

but may be high in the case of an ordinary employee. Different enactments have different concepts as to largeness of salary. Section 217(2A) of Companies Act, 1956 proceeds on the basis that Rs. 3,000/- per month is a high salary whereas Section 40A of the Income-tax Act, 1961 treats salaries above Rs. 5,000/- as large. Sarkar Commission has adopted its own figure of Rs. 1,000/- per month inclusive of perquisite as a high salary. Therefore, it is contended that the term of item 2 of Schedule 'C' are extremely vague. The names of the executives have not been mentioned. The names of the companies have also not been mentioned. High executive and relatives referred to are too vague and indefinite. The test of inadequate service is again too vague.

57. With regard to item 4 of Schedule 'C', it relates to allegation of defrauding or attempt to defraud Government of its legitimate revenues, unauthorised retention of foreign exchange abroad by manipulation of invoice values of the goods imported or exported or any other defrauding or attempt to defraud Government of foreign exchange. It is urged that the scope of inquiry cannot at all be ascertained under this item. There are numerous enactments which impose revenue. The indefiniteness of the term of reference could be judged by the fact that it would include and embrace even road tax for vehicles, corporation taxes, octroi, cess, licence fees for different licences under different laws besides income-tax, wealth tax, sales tax, gift tax, estate duty expenditure tax, central excise etc. It is also not indicated as to what defrauding signifies. The extent of the vagueness or indefiniteness and arbitrariness would be evident from the requisition made by the Commission by which particulars of cost of construction of roads, culverts, drains, paths etc. were asked for without even indicating as to how the same are relevant under the said item.

58. The retention of foreign exchange abroad by manipulation of invoice values is also utterly vague. Reference was made to a speech of Sri Morarji Desai in Parliament where he said "Four allegations related Birla Companies abroad. The first two are too general. They say, they are doing under invoicing or over invoicing. Now, how am I to find out anything from there? There is nothing mentioned. They say that they are keeping moneys there. Now nothing can be found out. How am I to find a phantom? As regards the Swiss firm we made inquiries there and nothing could be found and the banks would not help, these banks would not give us any information. If there is anything shown from which we can take even some clue then something can be found; but there is nothing to be found here." (Statement made on 5th March, 1969 in Rajya Sabha).

59. Reference was also made to the statement of Late Fakiruddin Ali Ahmed wherein he said "Action is being taken against the persons responsible for the several infringements wherever there is a *prima facie*

case. The Central Bureau of Investigation has also investigated serious offences and prosecutions are either launched or are being contemplated after further investigation.

60. Item No. 9 refers to the alleged manipulation of cost structure. Nothing has been specified as to what manipulation was made in respect of which particular goods. In the Ministerial findings dealing with these allegations it was stated as under : "no reference has been made to any particular company in these allegations nor to any specific case. It is considered that these allegations are too vague and general to be pursued effectively."

61. Item No. 11 relates to undue benefit derived by Birla Group of concern by employing senior government servants and whether there was any impropriety involved by such employment. The findings of the government is as follows :—It is true that some retired officers and relatives of ministers and government officers have taken up employment under Birlas. Where rules regulating the service of government offices required them to obtain prior permission of government to take up commercial employment within two years of employment, the rule is being enforced. As regards employment of members of families or dependants of government servants in private firms there are appropriate provisions in the statutory conduct rules to regulate such matters (vide Ministry of Home Affairs Appendix V Page 36).

62. Item No. 12 relates to the employment of large number of contact men in the Birla Group of concerns. The finding of the government is ; the revised secret list of contact men contains names of two persons belonging to the Birla Group of Companies. Names are included in the list if contact men came to adverse notice specifically during the investigation of any case or inquiry by C.B.I.

63. Item No. 13 deals with free treatment of senior government servants or well known politicians at the Bombay Hospital run by them. The findings of the government is "confidential inquiry was made out. No evidence is available to support the allegation that a number of very senior officers and well known politicians have been treated free at hospitals."

The decisions of the Supreme Court relating to Commission appointed under the Act fall into two groups of clauses i. e. to say (i) relating to a company and (ii) relating to conduct of erstwhile ministers. The Supreme Court emphasised that a Commission of Inquiry is necessary to establish cleanliness in public life but must relate to the definite matters of public importance.

64. My attention was drawn by Mr. Roychowdhury to the Ministerial speech made before Parliament. A question may arise how far and to what extent the Minister's speech in Parliament is relevant for determination of definite matters of public importance. The

Minister's speech is neither conclusive nor binding on the Courts for determination whether the matters referred to by the Minister before Parliament are definite matter of public importance or not. But those speech are relevant for the purpose of knowing the mind of the Government and its own opinion on the matters discussed about.

65. *Dalmia's* case relates to the affairs of the company. The dominant purpose of setting up the Commission of Inquiry under the Commission of Inquiry Act is to preserve the purity and integrity of public administration and to take legislative and administrative measures on the recommendation of the Commission to eradicate the evil found or to implement the beneficial objects. Detailed reference has been made to each and every impugned item of Schedule 'C' to the notification for the purpose of finding out whether those can be regarded as definite matters of public importance and whether those matters required further investigation by Sarkar Commission.

66. What is a matter of "public importance" has been considered by the Royal Commission on Tribunals of Inquiry, 1966 under the Chairmanship of the Rt. Hon'ble Lord Justice Salmon. In its said report Royal Commission felt that matters which cannot be dealt with by ordinary, civil and criminal processes and/or rare occasions when a nationwide crises of confidence occurs, the appointment of a Commission of Inquiry is justified. In Paragraph 28 of the said report it was observed as follows :—

"Normally persons cannot be brought before a tribunal and questioned save in Civil or criminal proceedings. Such proceedings are hedged around by long standing and effective safeguards to protect the individual. The inquisitorial procedure is alien to the concept of justice generally accepted in the United Kingdom. There are, however, exceptional cases in which such procedures must be used to preserve the purity and integrity of our public life without which a successful democracy is impossible. It is essential that on the very rare occasions when crises of public confidence occur the evil, if it exists, shall be exposed so that it may be rooted out ; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed. We are satisfied that this would be difficult if not impossible without public investigation by an inquisitorial Tribunal possessing the powers conferred by the Act of 1921. Such a Tribunal is appointed by Parliament to inquire and report. The task of inquiring cannot be delegated by the Tribunal for it is the Tribunal which is appointed to inquire as well as to report. The public reposes its confidence not in some other body or person but in the Tribunal to make and direct all the necessary searching investigations and to produce the witnesses in

order to arrive at the truth. It is only thus that public confidence can be fully restored."

67. It is also contended by Mr. Roychowdhury that the items referred to in Schedule 'C' were smuggled into the said notification mala fide and on extraneous consideration. There was a split in the Congress Party and consequent depletion of the support in Parliament to Mrs. Indira Gandhi as a result of which her Government became a minority government, only 221 members in the Lok Sabha supporting her. Young Turks in the circumstances, had to be placated by the appointment of the Sarkar Commission. The Mala fide would further be evident from the fact that both Rajya Sabha and Lok Sabha had refused to appoint a Commission and ignoring the wishes of Parliament and contrary to decision taken by Parliament the Government set up a Commission of Inquiry and referred to certain allegations of Sri Chandra Sekhar which constitute the items referred to in Schedule 'C' for inquiry knowing fully well that in the opinion of the Government those matters were not definite matters of public importance.

68. Reference was also made to the statement made by Sri George Fernandes, Minister for Industry in Rajya Sabha on 15.12.77.

69. Mr. Fernandes said "The terms of reference are also so worded that a Commission was asked to find out from 1956 to 1968 in respect of the large houses and Birlas one or two specific cases. If you really meant to have any investigation into specific acts of misconduct by an Industrial house, one does not go on framing terms of reference which make it impossible for you to function. * Therefore, the whole appointment of this Commission, formulation of terms of reference, subsequent attitude of the Government and the manner in which the whole operation has been conducted, makes us feel that there has been a game played and the name of the game is "to foil the people and stay in power". ** Apparently you hold an investigation against Birlas but see that in two generations the inquiry is not completed, thus inquiry cannot be completed its two generations. **The terms of reference are so comprehensive that there can never be the end of those investigations.

70. Misuse of power may arise either from breach of law conferring it or from the abuse of power in bad faith. In *Dalmia's* case the Supreme Court observed that where power is misused but there is good faith the act is only ultra vires. But where the misuse of power is in bad faith there is added to the ultra vires character of act, another vitiating circumstance * misuse may arise from a breach of law conferring the power or from an abuse of the power in bad faith. In (18) *P. K. Kunju v. State of Kerala* (AIR 1970 Kerala 252), relying on the above observations of the Supreme court, it is held that the use of power for achieving

alien purpose for example wrecking minister's vengeance or of an officer's would be malafide and a colourable exercise of that power.

71. Detailed reference has been made with respect to each of the items referred to in Schedule 'C' to the notification. When item No. 2 is read along with the memorandum of Sri Chandra Sekhar certain definite names have been found therein. In most of these cases, assessments were reopened. Salary payment with respect to some persons were disallowed by the Income-tax Officer, on appeal to the Tribunal they were allowed. In two cases, reference was preferred to the High Court. In other cases, the department did not prefer any references to the High Court. It is true that these matters are definite and not vague or indefinite as in other cases. But the question arises whether these matters could satisfy the test of public importance in respect of which legal proceedings had already been taken and disposed of. In my view, it cannot. It might fulfil one part of the conditions that these are definite matters. But do not satisfy the requirement of other part viz. the public importance. I have carefully gone through each and every item for the purpose of finding out whether it constitutes any definite matter of public importance or not. But these matters are neither definite nor of any public importance. Those are absolutely vague and general in nature, on the basis of which no bona fide opinion could be formed that those matters are definite matters of public importance and for that purpose a Commission of Inquiry is required. So, in my view, the conditions precedent for exercising powers under Section 3 of the Act have not been fulfilled with respect to the impugned items referred to in Schedule 'C' to the notification inasmuch as the matters are neither "definite" nor of any "public importance." In view of my above findings, it is not necessary for me in this case to deal in detail the point of mala fide raised by the petitioner in the instant case. That point is left undecided.

72. In the result, this Rule is made absolute. The impugned items i. e. 2, 4, 9, 11, 12 and 13 to Schedule 'C' to the notification are quashed.

73. Let a Writ of Prohibition be issued, prohibiting the Commission of Inquiry to inquire into those items.

74. I, however, make it clear that besides those items which have been quashed, the Commission shall be at liberty to proceed to inquire other matters in the notification in accordance with law.

There will be no order as to costs.

P. R.

[CIVIL APPELLATE JURISDICTION]

Before Mr. Justice Anil Kumar Sen and Mr. Justice

B. C. Chakrabarti

Decision : November, 20, 1978

Surendra Nath Arora

Versus

Appellant

Sm. Puspa Arora

Respondent*

Hindu Marriage Act, 1955, Section 24—Alimony pendente lite—Criteria for determination of conduct of parties—Whether a relevant consideration for determination of the quantum of alimony. Importation of principles from similar Act—Whether permissible

In a suit for judicial Separation filed by the appellant husband, the wife filed an application for maintenance pendente lite and for expenses of the litigation under section 24 of the Hindu Marriage Act, 1955. On a consideration of all facts the trial Court directed the husband to pay a maintenance of Rs. 500/- per month and also Rs. 500/- provisionally towards the expenses of the litigation. The appellant preferred an appeal against the aforesaid order before the Hon'ble High Court which.

HELD : (1) *The quantum of alimony being a matter of discretion depending on various factors, this discretion should not be curtailed by importation of principle from the Indian Divorce Act, in the absence of any express provision to that effect in the Hindu Marriage Act, 1955.* (Para 6)

(2) *Conduct of the parties is a relevant consideration in determining the quantum of alimony under section 25 of the Hindu Marriage Act,* (Para 8)

(3) *In the absence of special circumstances, one fifth of the husband's income less wife's income, if any, is taken as a safe guide for determining the quantum of alimony pendente lite.* (Para 9)

Cases referred to :—

(1) *Pratima v. Kamal Kumar*, 68 CWN 316.

(2) *Jagadish Prasad Tulsan v. Sm. Manjula Tulsan*, AIR 1975 Cal. 64.

Saktinath Mukherjee and Suchit Kumar Banerjee ...for appellant

D. P. Adhikary and Amalendu Kr. Banerjee ...for respondent

The judgment of the Court was as follows :—

Chakrabarti, J. : This is a husband's appeal against an order of maintenance pendente lite and costs of litigation awarded in favour of the wife in a suit for judicial separation brought by the husband, being Matrimonial Suit No. 19 of 1973 of the 5th Court of Additional District Judge at Alipore.

2. The wife filed the application under section 24 of the Hindu Marriage Act claiming Rs. 2000/- per month as maintenance pendente lite and a sum of Rs. 2,500/- provisionally towards expenses of the litigation.

* F. M. A. no. 839 of 1975.

She alleged that she had no independent source of income, that she has been deserted by her husband and was forced to live in her father's family, that the average monthly income of the husband is Rs. 3,800/- per month from his salary and allowances, that besides the said sum he has also other income derived from securities and interest from bank deposits. Having regard to the status of the parties and their living standard and also the financial capability of the husband, she claimed the sum aforesaid towards maintenance and expenses. It was further alleged that she had to incur considerable expenses towards litigation for she had to come all the way from Lucknow where she is at present residing in her father's family, to defend the suit.

3. The respondent admittedly is employed as General Manager (Works), under Messrs Shalimar Wire Industries Ltd., Calcutta. His case is that the respondent wife has independent source of income which is more than adequate for her needs. She has money in Savings Bank Accounts and earns interest therefrom. The petitioner hasband purchased shares of different reputed companies in the name of the wife the market value of which would be about Rs. 9,000/-. She earns dividends from such shares. The respondent while leaving the matrimonial home took away with her jewellery worth about Rs. 30,000/- and other valuables worth about Rs. 15,000/-. If the said articles and shares are converted into money and properly invested it can fetch an income around Rs. 8,000/- per annum. As regards his own ability the case of the husband is that he gets a sum of about Rs. 1,417/- per month at an average after deductions made by the petitioner's employer on account of income-tax, providend Fund, House Rent, Insurance etc. He has also to pay for the educational expenses of his younger brother and has to render occasional help to his aged parents. In such circumstances the husband alleged that the claim of the wife was highly excessive, arbitrary and untenable.

4. At the hearing of the application the father of the wife examined himself, the respondent due to illness being unable to attend the Court. On the side of the appellant the husband examined himself besides another witness who claimed to have attended the marriage ceremony of the parties. The husband also furnished a statement of accounts indicating roughly his average income.

5. The learned Additional District Judge found upon a consideration of the evidence that the wife had two Savings bank accounts with the Central Bank of India, Ballygunj, Calcutta, and The United Commercial Bank, Ganesh Chandra Avenue, Calcutta in her name. The amounts to her credit in the said accounts come to Rs. 1,750.01 and Rs. 1,353.87 respectively. The accounts however, were not operated since the wife left Calcutta. The allegation that the wife had taken with her valuable Jewellery worth Rs. 30,000/- and other articles worth Rs. 15,000/- besides the shares standing in her name have all been denied. The learned Judge

observed that these allegations made by the husband have not been satisfactorily proved. Accordingly the learned Judge found that she has no independent source of income and that she was being maintained by her father who in his turn was being assisted financially by his sons living abroad. The learned Judge determined the liability of the husband to pay maintenance at the rate of Rs. 500/- per month and also Rs. 500/- provisionally toward the expenses of the litigation. In arriving at this figure he took into account the statement furnished by the husband. He also took into account the costs of collection, income-tax and similar compulsory deductions the husband had to suffer. The annual income after taking into account the compulsory deductions was estimated at Rs. 36,886/- for the financial year 1973-74. The monthly salary thus came to Rs. 3,074/-. Having thus determined the net disposable income of the husband, the learned Judge awarded maintenance pendente lite at the rates as aforesaid.

6. Being aggrieved, the husband has preferred this appeal. Mr. Mukherjee appearing in support of the appeal urged only one point namely that the amount was excessive and arbitrary. He argued that as per the statement of accounts furnished by the appellant husband the net income during the financial year 1973-74 which the appellant earned came to Rs. 17,910/-. He, therefore contended that the learned Judge fell into an error in taking Rs. 36,866/- as the annual income of the husband. According to him nothing in excess of one fifth of the net income should be granted as maintenance pendente lite. In elaborating this argument Mr. Mukherjee referred to the proviso to section 36 of the Indian Divorce Act, which lays down "that alimony pending the suit shall in no case exceed one fifth of the husband's average net income for the three years next preceeding the date of the order" Mr. Mukherjee conceded however that the Hindu Marriage Act does not contain any express provision as to the maximum alimony that may be granted pending the litigation but argued that some indications may be had in this regard from the analogous provisions contained in an analogous law namely the Indian Divorce Act. The quantum of alimony to be awarded is certainly a matter of discretion depending on various factors such as the ability of the husband, the needs of the wife the social status, age, education and other requirements of the applicant and so on. In the absence of express provision as to the maximum alimony in the Hindu Marriage Act, the discretion vested in the Court in determining the reasonable amount of maintenance should not be curtailed by importation of principle from the Indian Divorce Act. This has been so held in the case of (1) *Pratima v. Kamal Kumar*, reported in 68 CWN page 316. In that case however the husband was proved to be drawing Rs. 1,187/- per month after all deductions and a sum of Rs. 250/- was found to be reasonable amount of maintenance pendente lite to be paid to the wife and son. Mr. Mukherjee

conceded that taking Rs. 17,910/- as the annual income the annual maintenance should not exceed Rs. 3,600/- representing one fifth of the total annual income less the sum the appellant is required to pay towards the compulsory deposit scheme and a sum of Rs. 100/- which he has to defray monthly for the educational expenses of his brother.

7. This at once takes us to the question whether the calculation of the net income was correct. The statement as furnished by the husband shows that he draws Rs. 48,600/- towards salary besides a sum of Rs. 9,360/- on account of bonus and a sum of Rs. 2356/- by way of dividend from shares. From this he has deducted a sum of Rs. 32,629/- on account of deduction towards Provident Fund, against accommodation provided by the employer and income-tax and surcharge on income-tax. He has also deducted a sum of Rs. 6,140/- allegedly paid by him towards Life Insurance premium. A sum of Rs. 3,637/- has also been deducted being interest paid by the husband on loans taken for investment on shares. The total earning without any deductions comes to Rs. 60,316/- Now the question is what deduction should be taken into account in order to find out the net income. The learned Addl. Judge did not take into account the voluntary contribution namely the Life Insurance premium etc. in working out the total net income. He, however deducted the income-tax and surcharge on income-tax and arrived at the figure of Rs. 36,886/-. Mr. Mukherjee made a grievance, and we think rightly that if the payments towards Life Insurance Premium and the voluntary contribution towards Provident Fund are not taken into account, then the income-tax payable would be much more than shown in the statement. Taking the income at Rs. 60,316/- from all sources, we had the income-tax and surcharge payable, worked by the office. It comes to Rs. 26,731/- approximately. Therefore, the total annual income comes to Rs. 33,585/-. From this should again be deducted a sum which the husband is required to pay towards compulsory deposits under the provisions of the Additional Emoluments (Compulsory Deposits) Act, 1974. Making provision for the same and for the sum of Rs. 100/- allegedly paid monthly by the appellant for the education expenses of his younger brother, the annual net income may be taken at about Rs. 30,000/-. If that be so, we do not think that the sum of Rs. 500/- towards maintenance pendente lite for the respondent wife is unreasonable. Incidentally we may refer to a suggestion put to P.W. 1 the father of the wife in cross-examination. He said in cross-examination in answer to a suggestion that it was not a fact that Rs. 500/- per month was sufficient for Puspa and her son. The suggestion obviously was made in the context of the claim of Rs. 2,000/. but at any rate the suggestion indicates that the sum awarded by the learned Additional Judge was not unreasonable.

8. The learned Advocate appearing for the wife also referred to us a decision reported in (2) *Jagadish Prasad Tulsan v. Sm. Manjula Tulsan*,

AIR 1975 Calcutta page 64 where it was observed, that as the Court is entitled to use its discretion depending on the facts of the case, one third of the admitted net income amounting to about Rs. 450/- per month could have been awarded, although a sum of Rs. 400/- per month was considered just in the circumstances of the case namely that in that case the wife was found guilty of cruelty towards the husband. It may be recalled that, that was a case for maintenance under section 25 of the Hindu Marriage Act where the conduct of the parties is a relevant consideration. There the sum of Rs. 400/- awarded, towards maintenance represented a little less than one third of the admitted net income.

9. There is no hard and fast rule on the basis of which the amount can be determined with precision. It depends on a variety of facts and circumstances, though ordinarily and in the absence of special circumstances, one fifth of the husband's income less wife's income, if any, is taken as a safe guide.

10. In the instant case we are unable to agree that the net disposable income of the husband is Rs. 17,910/- as alleged. It is in the vicinity of Rs. 30,000/- after making reasonable deductions. Consequently, the assessment of the maintenance pendente lite at Rs. 500/- per month as made by the learned Judge cannot be said to be unreasonable.

11. From this however should be deducted the wife's income if any.

12. So far as that is concerned there is not much of evidence which can be relied or acted upon. She has however about Rs. 3000/- in two Bank Accounts. If this sum is profitably invested, it may fetch about Rs. 300/- by way of interest per annum. Consequently the maintenance awarded by the learned Judge may be reduced to the extent of Rs. 25/- per month. And we find accordingly. The appeal accordingly succeeds to this extent only. The monthly maintenance pendente lite is determined at Rs. 475/-. There is nothing to interfere with the award of Rs. 500/- towards expenses of litigation.

13. The appeal therefore is allowed in part to the extent indicated above. We make no order as to costs.

Sen, J. : I agree.

K.M.G.

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